

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NOS. 821 of 1979, 988 of 1988, 1091 of 1979, 1328 of 1987

with

FIRST APPEAL NO. 831 OF 1986

with

SECOND APPEAL NO. 252 OF 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

DECD.CHIMANLAL CHANDULAL TRIVEDI

Versus

NADIRSHAH PIROZSHA DALAL

Appearance:

1. Civil Revision Application No. 821 of 1979
MR. S.B. VAKIL for Petitioners
MR SH SANJANWALA for Respondent No. 1
2. Civil Revision Application No. 988 of 1988

MR. S.M. SHAH for the petitioenrs
MR. S.B. VAKIL for the respondents

3. Civil Revision Application No 1091 of 1979

MR SH SANJANWALA for Petitioners
MR SB VAKIL for Respondent No. 1

4. Civil Revision Application No. 1328 of 1987

MR. S.B. VAKIL for Petitioners
MR. S.M. SHAH for respondent No. 1
Notice served on respondent No. 2

5. First Appeal No. 831 of 1986

MR. S.M. SHAH with MR. T.S. NANAVALI for
the appellant
MR. S.B. VAKIL for respondent

6. Second Appeal No. 252 of 1979

MR. S.B. VAKIL for the appellant
MR. S.M. SHAH for respondent No. 1
MR. S.H. SANJANWALA for respondents 2-8

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 9/4/2001

C.A.V. JUDGEMENT

C.R.A. No. 821/1979:

1. Chimanlal Chandulal Trivedi the petitioner-original defendant-the tenant has filed this Civil Revision Application before this court against the judgement and decree dated 30.12.1978 passed by the learned Extra Assistant Judge, Surat, in Revision Application No. 6 of 1977. Revision Application No. 6 of 1977 arose out of filing Standard Rent Application being Rent Miscellaneous Application No. 570 of 1971 filed by the tenant for fixation of standard rent of the suit premises.

C.R.A. No. 1091 of 1979 (Landlord's revision)

2. Nadirsha Pirojsha Dalal - original plaintiff, petitioner in this petition-the landlord, has filed this revision application against judgement and decree dated 30.12.1978 passed by the learned Extra Assistant Judge, Surat, dismissing Regular Civil Appeal No. 97 of 1977. The said appeal No. 97 of 1977 has been filed by the

landlord plaintiff against the judgement and decree dated 28.2.1977 passed by the learned Civil Judge (S.D) dismissing the suit for possession of the plaintiff landlord.

BACKGROUND OF THE MATTER:-

3. There is a property known as Firoz Villa bearing Nondh No. 1236 of Ward No. 7 situated at Variavi Bazar, Surat (hereinafter referred to as 'Suit Property'). The said property consisted of a bungalow with three rooms and iron sheet garage, outhouse and land. In the year 1944 Nadhir Shah's father Ferozsha expired. In 1946 Ferozsha's second wife and Nadhirsha's mother expired leaving Nadhirsha and others. Nadhirsha originally rented the suit property to Sundarlal Chokshi at monthly rent of Rs. 75/- and subsequently the same was let to C.C. Trivedi at Rs. 100/- per month. On 8.1.1959 (Exh. 34) C.C. Trivedi executed a rent note in favour of Nadirsha.

3.1 Since 1961 there were negotiations going on between Ferozsha and C.C. Trivedi for sale of the property to C.C. Trivedi during which Nadirsha has represented that he was the sole owner of the property.

3.2 Nadhirsha filed Regular Civil Suit No. 729 of 1964 for eviction against C.C. Trivedi on several grounds namely, change of user, subletting, making permanent constructions and for arrears of rent.

3.3 Nadhirsha - plaintiff and C.C. Trivedi original defendant entered into consent terms somewhere in 16.10.1968 at Exh. 30. The consent terms inter alia state as follows:

"The defendant to hand over the possession of the suit property to the plaintiff on 17th October, 1969, but the plaintiff has to sell the said property to the defendant on or before 17.10.1969 for the consideration of Rs. 55,000/- and the defendant has to bear all the expenses for the sale deed. If the defendant pays or deposits in Court the amount of Rs. 55,000/- being the consideration for the sale of the said property and the defendant does not purchase the same upto 17th October, 1969, the plaintiff is entitled to take possession of the suit property from the defendant on 17th October, 1969. But if the defendant is ready to pay the amount of Rs. 55,000/- being consideration of the same, but the

plaintiff does not get the title of the property cleared, the plaintiff will not be entitled to take possession of the suit property on 17th October, 1969, but the plaintiff has to continue the defendant as tenant in the suit property on monthly rent of Rs. 250/- on the terms as stated in the rent note dated 8th January, 1969. Whether the title of the suit property is clear or not, the decision given by advocate Shri G.U. Patel on the point is to be accepted by the parties as final and the parties have to obtain the said decision before 17th September, 1969. The party will be entitled to enforce by a suit of specific performance against defaulting party."

3.4 In view of the consent terms the court passed a consent decree on 17.10.1968 in Regular Civil Suit No. 729 of 1964 (Exh. 33).

3.5 Shri C.C. Trivedi addressed a notice dated 28.10.1968 for the execution of the Sale Deed. Shri C.C. Trivedi also addressed another notice dated 25.2.1969 to Nadirshah for execution of Sale Deed. Shri C.C. Trivedi also addressed another notice dated 11.4.1969 to Shri Nadirshah requiring him to clear the title and execute the Sale Deed.

3.6 It appears that from 11.6.1969 Shri C.C. Trivedi is said to have fallen in arrears of rent till 31.1.1971.

C.R.A. NO. 821/1979 (Tenant's revision) AND CRA 1091/1979 (Landlord's revision): (Present controversy)

4. Thereafter Nadirshah filed Regular Civil Suit No. 404 of 1971 in the Court of Civil Judge (S.D.) against Shri C.C. Trivedi for obtaining vacant and peaceful possession of the suit property together with Rs. 500/- towards rent and Rs. 100/- towards the mesne profits and for obtaining mesne profit at Rs. 250/- per month from the date of the suit and for the costs of the suit. The suit was filed on the ground of arrears of rent and also demolition of the whole structure and making material changes of the suit premises and also on the ground of permanent construction of a factory on open land.

5. The defendant Shri C.C. Trivedi filed written statement Exh. 13 and contended that the plaintiff had no right to sue as other persons are also interested in the suit property. It was also stated that the suit is

barred by principle of res judicata. It is also denied that rent of the suit property was Rs. 250/- per month. He has also contended that he was a permanent tenant of the suit property and he has made changes regarding user of the bungalow. He has also stated that the original plaintiff has also filed Regular Civil Suit No. 729 of 1964 and the same grounds have been raised and therefore the suit is barred by principle of res judicata. It was also stated that the standard rent of Rs. 250/- was fixed in view of the consent terms entered into between the parties.

5.1 The defendant also filed rent application No. 670 of 1971 for fixation of the rent.

6. The Trial Court by its judgement and decree dated 28.2.1977 was pleased to dismiss the suit of the plaintiff for possession. However, the Trial Court ordered and decreed that the plaintiff do recover Rs. 500/- towards the rent from 1.2.1971 to 31.3.1971 and Rs. 100/- towards the mesne profit, total Rs. 600/- only from the person and properties of the defendant. The standard rent of the suit property was fixed at Rs. 250/per month. The suit of the plaintiff for possession is dismissed while the decree for rent and mesne profit is passed. The Trial Court also dismissed the rent petition of the defendant.

7. Being aggrieved and dissatisfied with the aforesaid judgement and decree, the landlord filed appeal before the Extra Assistant Judge, Surat somewhere on 1.4.1977 being Regular Civil Appeal No. 97 of 1977. The defendant also filed appeal being Regular Civil Appeal No. 117 of 1977 against the judgement and decree which was against the defendant tenant. The defendant C.C. Trivedi also filed Civil Revision Application No. 6 of 1977 against the order of the trial court dismissing the revision application No. 670 of 1971 for fixation of standard rent.

8. All these matters were heard together and the Extra Assistant Judge by his judgement and decree dated 30.12.1978 was pleased to dismiss both the appeals as well as the application and confirmed the judgement and decree of the Trial Court in Regular Civil Suit No. 404 of 1971 and Miscellaneous Civil Application No. 570 of 1971. The learned judge held that the respondent tenant is not entitled to agitate the dispute of standard rent. The learned judge also held that the Trial Court has not erred in passing decree of eviction on the ground of arrears of rent. The learned judge has held that the

appellate court held that the suit is barred by principle of estoppel and he is not entitled to raise the grounds of unlawful subletting, permanent alterations and modifications and breach of the terms of the contract and damage to the suit property in the present suit as all those grounds were pleaded by the appellant in the previous suit and none of them has arisen after the decree was passed in Regular Civil Suit No. 729 of 1964 except the construction of a new flush latrine by the respondent in the suit bungalow.

8.1 The court further held that in view of the earlier suit filed being 729 of 1964 and consent terms filed on 17.10.1968 and the decree passed in terms of the said consent terms the respondent is estopped from challenging the standard rent fixed in Regular Civil Suit No. 729 of 1964. The learned trial judge also rejected the contention of the tenant that the said consent term was obtained by fraud. The court further held that the trial court has rightly held that the plaintiff appellant is not entitled to decree for possession on the ground of non-payment of rent.

8.2 Against the aforesaid judgement and decree Shri C.C. Trivedi had filed Civil Revision Application No. 821 of 1979 before this court so far he has aggrieved. Shri Nadirshah Dalal filed Civil Revision Application No. 1091 of 1979 before this court so far he has aggrieved.

C.R.A NO. 1328 OF 1987 (Tenant's revision) WITH C.R.A. NO. 988 OF 1988 (Landlord's revision)

9 Shri C.C. Trivedi, petitioner - original defendant, has filed Revision Application No. 1328 of 1987 before this court against the judgement and decree dated 7.11.1987 passed by the Assistant Judge, Surat. The learned judge by his judgement and decree was pleased to partly allow the appeal of the appellant-original plaintiff (respondent herein) and passed a decree for eviction pertaining to the suit bungalow on the ground that Nadirshah, landlord, bona fide and reasonably required the bungalow for his residence by rejecting his case of bona fide requirement for business. The learned Assistant Judge thereby was pleased to confirm the judgement and decree passed in Small Rent Suit No. 470 of 1977 passed by the learned Additional Judge, Small Causes Court, Surat. The learned Assistant Judge, Surat, was pleased to direct the respondent-tenant to handover the possession of the suit bungalow to the appellant landlord within two months from the date of the order.

The learned Assistant Judge, however, was pleased to partly set aside the said judgement and decree of the learned Additional Judge, Small Causes Court, Surat.

9.1 The facts giving rise to this application are are under:-

9.2 Shri C.C. Trivedi-tenant, petitioner is original defendant and Nadirshah P. Dalal-landlord, respondent, in revision application is original plaintiff. The plaintiff had filed a suit, being Small Rent Suit No. 470 of 1977 in the Small Cause Court at Surat, inter alia, praying for possession of the suit premises. In the said suit it was contended that the defendant is in arrears of rent for more than six months and the plaintiff required the suit premises reasonably and bona fide for his residence and business and suit notice dated 3.3.1977 was served on the defendant and since he failed to comply with the same, the said suit had to be filed. It was stated that originally in the suit notice the ground of reasonable and bona fide requirement of the landlord was not mentioned. However, bona fide requirement which was stated was only for the purpose of residence. However, subsequently, by way of an amendment the bona fide requirement for carrying on business was added.

9.3 Shri C.C. Trivedi, original defendant, (petitioner herein) appeared and resisted the suit by filing written statement at Exh. 15 and written statement of the amended plaint at Exh. 37 and contended inter alia that the plaintiff alone has no right to file the present suit and that the suit is bad for non-joinder of necessary parties. It was also denied that the rent of Rs. 250/- is standard rent. It was also denied that standard rent was fixed in Rent Suit No. 729 of 1964 at Rs. 250/- per month. The dispute of standard rent is subjudice. He further denied that he is in arrears of rent from 1.2.1971. He contended that he had replied to the suit notice on 11.3.1977 and raised real dispute of standard rent. He also stated that after the receipt of demand notice the defendant filed inter-pleader suit No. 306 of 1977. He stated that he was always ready and willing to pay the rent and never neglected to pay arrears of rent to the plaintiff. It was also stated that the defendant had served notice to the plaintiff and informed the plaintiff that the defendant is prepared to purchase the suit property as per terms of agreement contained in compromise Suit No. 729 of 1964. He further stated that according to the contention of the defendant to raise a dispute that the plaintiff is not

the sole owner and that there are other co-owners along with the plaintiff does not amount to denial of title of the plaintiff. He has stated that he has filed suit being Suit No. 153 of 1974 for specific performance of an agreement of suit property by the plaintiff to defendant on the basis of an agreement contained in compromise Rent Suit No. 729 of 1964. The plaintiff landlord refuses to execute the Sale Deed in pursuance of the compromise which was entered into by and between the parties, the defendant-tenant was constrained to file suit being Suit No. 153 of 1974 in the Court of Civil Judge (S.D.), Surat for specific performance to contract. The said suit has been partly decreed and directed defendant No. 1 Nadirsha to execute registered sale deed in favour of the plaintiff for whatever share he is having in the suit property after receiving a sum of Rs. 55,000/- from the plaintiff within two months. Defendant No. 1 is also ordered to put the landlord in symbolic possession of his share in the suit property after executing registered sale deed. The said suit has been decreed on 31.3.1986 by the Third Joint Civil Judge (S.D.), Surat.

9.4 Being aggrieved by the said judgement, the present plaintiff has filed First Appeal No. 831 of 1986 which was admitted by this court on 14.7.1986. It was stated that the suit has been filed with a view to get rent enhanced from time to time.

9.5 The learned Addl. Judge, Small Cause Court, Surat, by his judgement and decree dated 1.10.1982 was pleased to decree the suit of the plaintiff for possession. The learned trial judge however decreed the suit of the plaintiff for arrears of rent for Rs. 9,000/and further held that since the standard rent has already been fixed in Regular Civil Suit No. 729 of 1964, it cannot be refixed in the present suit.

9.6 Being aggrieved and dissatisfied with the judgement and decree passed by the learned trial judge, the plaintiff landlord filed Regular Civil Appeal No. 370 of 1982.

9.7 The learned Assistant Judge, Surat, by his judgement and decree dated 7.11.1987 was pleased to partly allow the appeal of the appellant and passed a decree for eviction pertaining to the suit bungalow on the ground that the landlord bona fide and reasonably required the suit premises for his residence by rejecting the case of bona fide requirement for business.

9.8 Being aggrieved and dissatisfied with the judgement and decree passed Regular Civil Appeal No. 370 of 1982 by the lower appellate court, the petitioner, Shri C.C. Trivedi, has filed Civil Revision Application No. 1328 of 1987.

9.9 The original plaintiff Nadirshah P. Shah has filed Civil Revision Application No. 988 of 1988 against the said judgement and decree so far as the appeal which has been dismissed by the learned appellate judge in this behalf. The said Civil Revision Application was filed on 29.1.1988.

10. All these matters are inter related and therefore I decide all the matters together.

10.1 Mr. S.B. Vakil, learned counsel for the petitioner C.C. Trivedi submitted that there are some basic facts which will have to be considered over and above the facts which have been set out earlier in this behalf. Originally the property belonged to Pirozshah Dalal. The following pedigree emerges from the indenture of release: Pirozshah F. Dalal had wife Dhunbai. Firozshah died on 19.1.1944 leaving his mother Jerbai, his wife Dhanbai, Dasang, i.e. plaintiff, daughter Sunaji Manekji Illuwada and children Dhun (son) and Mehru Palsadia of the predeceased daughter Freny Sorabji Gagrati. Dhunbai died on 24.4.1946. They had children Nadirshah, Freny, Themy, Suna. Freny married Sorabji Gagrati.

10.2 Before 1991 succession to a Parsi died intestate was governed by Sections 50 to 56 of Chapter III. In the year 1954 Jerbai died.

10.3 It was further stated that thereafter on 8.1.1959 C.C. Trivedi executed a rent note in favour of Nadirshah. On 12.1.1960 daughter Suna Manek Illuwada, Dhun Sorabji Gagrati and Mehru Palsadia released their 5/9th share in the property in favour of Nadirshah. It would appear that on the date of the Deed of release Nadirshah had 4/9th and his two sisters Suna and Freny had 5/9th shares. By the release Deed Suna and Freny have released their 5/9th shares in favour of Nadirshah. That apart, even if the release Deed is not considered Nadirshah had his own 4/9th share in the suit property which is a substantial share. It was submitted that the original owner Pirozshah Dalal executed a release Deed in favour of Nadirshah.

10.4 It was further submitted that before the proceedings started Nadirshah informed Shri C.C. Trivedi that others had right in the property. Nadirshah terminated tenancy of C.C. Trivedi and filed Regular Civil Suit No. 721 of 1964 for eviction.

10.5 As stated earlier, on 17.10.1968 consent terms providing inter alia that Nadirsha had to clear his title. It is submitted by the learned advocate, that the consent terms provide for a decree of eviction coupled with agreement to sell. It sets out the circumstances under which the landlord could recover possession on 17.10.1969. It also records the circumstances under which the landlord was not entitled to recover possession on 17.10.1969 and was bound to continue Trivedi as a monthly tenant on the rent of Rs. 250/- per month. Under the terms either party could obtain the decision of advocate Mr. G.U. Patel before 17.9.1969. This would mean that if the landlord claim right to possession contending that he had cleared the titled, it would be for him to obtain the decision of Mr. G.U. Patel. On the other hand if the tenant claimed that the landlord was not entitled to possession because the plaintiff had not cleared the title, the defendant had to obtain the decision of Mr. G.U. Patel by 17.9.1969. If neither party obtains such decision, the question of title would be required to be decided objectively and de hors any decision of the advocate Mr. G.U. Patel.

10.6. The learned counsel for the petitioner, submitted that the relevant facts are that the suit property had been earlier let on a monthly rent of Rs. 75/- per month. Under the rent note dated 8.1.1959 the agreed rent was Rs. 100/- per month. The landlord had demanded rent at Rs. 100/- per month and never claimed that the standard rent was higher much less applied for fixing the standard rent above Rs. 100/- per month. The suit ended in the consent decree dated 17.10.1969 which at the outset provides for a decree for eviction. The rigor of the decree for eviction is sought to be reduced by an agreement to sale and continuance of tenancy in certain circumstances on the accrued standard rent of Rs. 250/per month. Apparently, the standard rent is not fixed on consideration of Section 5(10) or 11 of the Rent Act. The tenant was compelled to agree to the standard rent of Rs. 250/- per month to avoid eviction. If ultimately, the standard rent is fixed at Rs. 100/- per month the decree passed in Regular Civil Suit No. 404 of 1971 and 470 of 1977 for arrears of rent would be required to be modified.

10.7 He further submitted that fixation of standard rent under consent decree dated 17.10.1969 was without jurisdiction. The same is illegal and liable to be set aside.

10.8 It is further submitted that the provisions of standard rent contained in the Rent Act have been enacted in public interest and in implementation of public policy of the State and the tenant cannot contract himself out of the same. He has further submitted that this is not a case of lease simpliciter but a case of lease coupled with an agreement to sell. It cannot be disputed that qua the agreement to sell the tenant can insist on clearance of title. Moreover, tenant's right to purchase had acquired possession would supersede the landlord's right to possession on determination of tenancy. Therefore, if the tenant succeeds in getting a decree for specific performance, no decree for eviction can be passed against him. He further submitted that in the present case it is clear from the rent note that with the consent of the landlord C.C. Trivedi purchased the metal sheet compound wall as well as an outhouse the ownership whereof remained with the tenant. It also appears that the tenant was permitted to carry out repairs and amendments to the bungalow and adjoining roofs and outhouse as well as to make construction on the open land for the purpose of a weaving factory. Whatever construction were made by the tenant would remain of his ownership and he would be entitled let out the same. In fact, the landlord has admitted in plaint of his Regular Civil Suit No. 404 of 1971 that C.C. Trivedi demolished old latrine and constructed a new latrine, made material changes into rooms attached to the bungalow, constructed a factory in open land, carried alterations in the western and southern lobby, removed the old structure purchased from the previous tenant and made pucca structure in its place. If the decree for specific performance was not granted if and when the tenant was evicted by the landlord he would suffer the loss of the money spent by him for such constructions permitted under the rent note and defendant would lose not only the demised property but his own property standing on the suit property. In this connection he has relied on the decision in the case of DEVKARAN NENSHI TANNA VS. MANHARLAL NENSHI reported in AIR 1994 SC 2747. The Hon'ble Supreme Court on pages 2749 & 2750 at paras 7 and 8 observed as follows:-

"Para 7 - The question then is whether the tenant

can make successive applications for fixation of the standard rent. It is true, as rightly contended by Sri Verma, that once a standard rent has been determined by the Court, after applying its mind to all the facts and circumstances after adjudicating the dispute, under S. 11(1)(e) or permitted increases, then unless that order is reversed or set aside by the appropriate appellate Court or the revisional Court or on appeal by this Court, parties are bound by the adjudication of the standard rent and to make payment thereafter. But in a case where adjudication was merely passed on a compromise between the parties, the question emerges whether the tenant is precluded to invoke the defence under Section 12(3)(a) of the Act. This point is squarely covered by the judgement of this Court in Prithvichand Ramchand Sablok Vs. S.V. Shinde (1993) 3 SCR 271 at 277: (1993 AIR SCW 2223 at p. 2229). Therein this Court had stated that:

".... a decree passed on the basis of a compromise by and between the parties is essentially a contract between the parties which derives sanctity by the court superadding its seal to the contract. But all the same the consent terms retain all the elements of a contract to which the Court's imprimatur is affixed to give it to the sanctity of an executable Court order. We must, however, point out that the Court will not add its seal to the compromise terms unless their terms are consistent with the relevant law. But, if the law vests exclusive jurisdiction in the Court to adjudicate on any matter, e.g. fixation of standard rent, the Court will not add its seal to the consent terms by which the parties have determined the standard rent unless it has applied its mind to the question and has satisfied itself that the rent proposed by consent is just and reasonable. In such a case it is the independent satisfaction of the Court which changes the character of the document from a mere contract to a Court's adjudication which will estop the tenant from contending otherwise in any subsequent proceedings and operate as res judicata. If the standard rent is fixed solely on the basis of agreement between the parties, such a decree in invitum will not preclude the tenant from contending in any subsequent proceeding that the rent is excessive and require

the Court to fix the standard rent.

In the order dated June 30, 1964 the Court passed the following order:

"Parties compromise read and recorded. As per consent terms of parties, the standard rent is fixed at Rs. 211.00 (two hundred eleven) per month.

No order for costs."

Para 8. This is clearly an indication of the fact that the Court did not apply its mind to the factum whether the terms agreed by the parties are just and reasonable and whether it would be the standard rent consistent with the provision of the Act. Sri Dholkia, the learned senior counsel for respondent is right in his contention that the order should disclose the application of Court's mind to the facts and then to the determination of the standard rent on the basis of the terms, other evidence or records and the consent of the parties is consistent with the Act and should record its satisfaction. It is settled law that the Act is a welfare legislation and parties cannot contract out of the statute and the seal of approval of the Court does not superadd its sanctity, nor receive its legality or validity or sanctity without due adjudication. In this case, as seen such adjudication and a satisfaction was not reached by the Court below. The respondent is not precluded to make an application when the notice was issued by the appellant demanding payment of the arrears of the standard rent. Thereby, it is not a case where the tenant had abused the process of the Court and made any successive application despite the standard rent fixed by the Court at Rs. 211/- by order dated 30.6.1964. The High Court, therefore, was right in holding that the defence under Sec. 12(3)(a) is available to the tenant and rightly allowed the revision and set aside the decree of the lower Courts and dismissed the suit."

10.9 Regarding eviction - C.R.A. No. 1091 of 1979 filed by Nadirshah - in the suit regarding eviction the plaintiff has raised contentions regarding grounds of eviction namely arrears of rent, erection of permanent structure, subletting, breach of terms of tenancy, and also personal requirements.

10.10 Arrears of rent - The learned counsel for the petitioner submitted that this ground arises in both the suits namely Regular Civil Suit No. 404 of 1971 and Small Rent Suit No. 470 of 1977. The landlord by his notice Exh. 35 dated 2.3.1971 demanded arrears of Rs. 5000/- at Rs. 250/- per month for 20 months from 1.6.1969 to 31.1.1971. The notice did not contain any demand of property taxes.

10.11 He contended that notice Exh. 35 does not contain any specific demand for property taxes and therefore the demand of rent under Section 12(2) of the Rent Act must be specific otherwise notice in that respect would be invalid. He has relied on the following decision in this behalf.

1. KHIMJI BHIMJI MAJITHIA VS. TARABEN LALJI SONI reported in 23(2) G.L.R. 114. In this case the Division Bench on page 118 at para 5 observed as under:-

"In our opinion, therefore, the language of sub-sec. (2) of Sec. 12 in the context in which it has been placed and in the context of the avowed purpose of the legislature, requires that the notice must contain a specific demand of rent. It must tell the tenant that this is the last opportunity afforded to the tenant to pay up the arrears. When the words a sub-sec. (2) of Sec. 12 speak of the words 'demand in writing' it is inevitable to hold that that demand must be there expressly. It cannot do to say for a landlord that if the statement of arrears is given in the notice, the tenant by necessary implication is told of the provisions of Sec. 12(1) and also of the provisions of Sec. 12(2), of the Rent Act and therefore, tacitly called upon to pay arrears. The Legislature, as we have stated above, was conscious of the comparatively more lack of knowledge on the part of the tenant and that is why the Legislature provided expressly that the notice in writing must demand of the tenant the arrears of rent."

10.12 The learned counsel has also relied on another judgement of this court in the case of SHAH ASHOKKUMAR MANILAL VS. GANDHI VRAJLAL GABHRULAL reported in 36(1) G.L.R. 767. In para 3 on page 770 the court observed thus:

"It is settled principle of law that a notice in

a rent case is to be construed liberally. Reference in this connection may be made to a decision of the Bombay High Court in the case of LALSHANKAR MULJI JOSHI VS. KANTILAL MOHANLAL PARIKH, reported at 74 (1992) BLR 241, where a learned single Judge of the Bombay High Court was required to deal with a similar situation as has arisen for consideration by this Court. Following an unreported decision of the Hon'ble Supreme Court in RAGHUNATH RAVJI DANDEKAR VS. ANANT NARAYAN APTE, (1966) Civil Appeal No. 387 of 1964, decided on April 5, 1966 (Supreme Court) it has been held that a liberal construction should be put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises or the name of the tenant or the date of the expiry of the notice and the sufficiency of the notice should be worked out bearing in mind that the notice issued is not to a stranger but to a tenant presumably conversant with all the facts and circumstances and the mistake. Following observations need be expected.

^The Supreme Court in Raghunath Ravji Dandekar Vs. Anant Narayan Apte, while considering the validity of a notice, which demanded Rs. 7,000/-, when actually according to the Courts below only Rs. 6900/-, were due, observed that they were not able to understand how the notice to quit under the Transfer of Property Act will be bad because of a mistake or oversight in demanding more than was due under Sec. 12(2) of the Rent Act. Their Lordships held that all that Sec. 12(2) of the Rent Act requires is the notice by the lessor for payment of arrears of rent. Their Lordships further observed that it was true that such a notice shall contain the figure of the amount due as arrears of rent, but according to their Lordships, if there was a mistake in the amount specified in the notice, that did not, in their opinion, make the notice under Sec. 12(2) bad or because of that mistake the notice to quit under the Transfer of Property Act bad. It appears to me that simply because by mistake or oversight the landlord had demanded the rent for the month for which it was not due, that would certainly not make the notice invalid. The view taken by the learned Assistant Judge is, therefore, not correct."

10.13 The learned counsel for the petitioner submitted that C.C. Trivedi with his reply to the notice tendered Rs. 5000/- which Nadirshah received. Thereafter, Nadirshah did not give any further notice under Section 12(2) of the Act before filing Regular Civil Suit No. 404 of 1971. In April, 1971 Nadirshah filed the suit for eviction inter alia on the ground of non-payment of Rs. 600/- i.e. for February, March and part of April of 1971. For this rent note notice under Section 12(2) of the Act was given by Nadirshah. He submitted that C.C. Trivedi would be protected against the eviction under Section 12(2) of the Rent Act. For that purpose he has relied on the following decision:

1. AMBALAL VS. BABALDAS reported in (1962) 3 G.L.R. 625. In this case on pages 634-635 it is observed thus:

"Therefore, it is at the date when such a cause of action accrues to the landlord that the Court has to ascertain whether the prohibition against the landlord laid down in sub-section (1) against his right to recover possession existed or not. This position becomes clear also from the provisions of sub-section (2) which lays down an obligation on the landlord to serve a notice in writing of the demand of the standard rent and permitted increases and the necessity of one month expiring even after such a notice has been served upon the tenant. Sub-section (2) thus lays down a condition precedent and evidently it is done to give an opportunity to a defaulting tenant to pay up the arrears and save himself from being evicted. If the tenant pays up the arrears within the time prescribed in sub-section (2), he gets the protection of sub-section (1). The effect of sub-sections (1) and (2) therefore, is two fold:

- (a) If the tenant has paid or has been ready and willing to pay the standard rent and permitted increases, he is protected by sub-section (1) and he cannot be evicted, and
- (b) even if he has committed default but pays up within the time laid down in sub-section (2), which would be before the institution of the suit, he would still be protected under sub-section (1).

The Legislature has then gone one step further by

providing in sub-section (3)(b), in cases not falling either under sub-section (1) on the one hand and sub-section (3)(a) on the other, a further opportunity and safeguard if the defaulting tenant pays up the arrears on the first day of the hearing of the suit or on such other date that the Court may fix and continues to pay thereafter regularly. Thus the Legislature has created safeguard for the tenant available to him at three different stages.

- (1) If he has been paying or has been or is deemed to be ready and willing to pay the standard rent and permitted increases at the date of the suit, sub-section (1) protects him,
- (2) Even if he has not been paying or has not been ready and willing to pay and has in fact committed default, but pays before the date of the suit within the time prescribed by sub-section (2), in which event sub-section (1) again safeguards him, and
- (3) Even if he has not paid or has not been ready and willing to pay and has in fact committed default, except in cases falling under sub-section (3)(a), he is still safeguarded by sub-section (3)(b), if he makes payment on the first day of hearing or on or before such date fixed by the court."

Again at page 636 it is further observed as under:

"In our view, it is only if sub-section (1) is construed to mean the state of things existent at the date of the institution of the suit and not at the date of the decree which affords protection that sub-section (1) and sub-section (3)(b) can be reconciled and made harmonious. It would also appear that the interpretation sought by Mr. Shastri would make sub-section (2) superfluous because if the Legislature wanted to protect under sub-section (1) a tenant committing default but making payment of arrears at the last minute before the decree is passed, there would have been no necessity for compelling the landlord to give notice and give time to the

tenant till one month after he receives notice and then seek protection under sub-section (1). It would seem that the service of notice under sub-sec. (2) was made compulsory and a condition precedent to the institution of the suit because if the tenant paid up within the time prescribed therein, the landlord would have no cause of action to institute a suit for ejectment. Further, if one examines sub-section (3)(a) closely, it becomes clear that the construction of sub-section (1) sought by Mr. Shastri cannot be accepted without making sub-section (3)(a) also superfluous. Sub-section (3)(a) lays down four conditions, namely:

- (1) that the rent is monthly,
- (2) that the arrears are for six months or more,
- (3) that there is no dispute with regard to the standard rent and permitted increases, and
- (4) that there is neglect on the part of the tenant to pay the arrears even after the lapse of a month after notice."

Further on pages 641-642, it is observed thus:

"Sub-section (1) of Section 12 contemplates cases where there is no dispute as to standard rent or permitted increases and also cases where there is such a dispute. The words "so long as the tenant pays" show that since the tenant in such a case pays the standard rent and permitted increases, there is no question of a dispute in regard to them. It is only when there is a dispute as to the standard rent or permitted increases that the tenant may not pay or the payment tendered by him may not be accepted by the landlord and in such cases the question of readiness and willingness would arise. On the construction placed by us on sub-section (1), if the tenant has not paid but has shown his readiness and willingness to pay the standard rent or permitted increases at the date of the suit, it would be sufficient to entitle him to the protection of sub-section (1). But it was urged on behalf of the landlord that readiness and willingness as contemplated by sub-section (1) meant only that readiness and willingness as laid down in the explanation to section 12. In other words, unless a tenant takes steps before the expiry of the period of

one month after notice under sub-section (2) as provided for in the explanation, he cannot avail himself of the protection of sub-section (1)."

10.14 He further submitted that in Regular Civil Appeal No. 370 of 1982 (subject matter of revision application No. 1328/87) the District Court passed a decree partially for eviction on the ground of arrears of rent. Therefore, Nadirshah has filed Civil Revision Application No. 988 of 1988 against the appellate judgement refusing the eviction on the ground of arrears of rent. The District Court held that C.C. Trivedi was protected under Section 12(2) as well as Section 12(3)(b) of the Act and was not liable to be evicted under Section 12(3)(a). In July, 1970 Exh. 11 subject matter of Second Appeal Nadirshah had in the suit for specific performance pleaded that there were other co-owners of the property. In 1977 Nadirshah gave to C.C. Trivedi notice under Section 12(2) demanding arrears of rent of Rs. 18,250/- at Rs. 250/- per month for 73 months from 1.2.1971 to 28.2.1977. This notice also did not demand property taxes.

10.15 Thereafter C.C. Trivedi filed an interpleader suit being Regular Civil Suit No. 306 of 1997 against Nadirshah and other co-owners. On 11.3.1977 C.C. Trivedi replied to the notice dated 3.3.1977 received on 8.3.1977 and raised a dispute as to standard rent. On 1.4.1977 Exh. 121 C.C. Trivedi deposited Rs. 18,250/- in the interpleader suit to the knowledge of Nadirshah (page 23 para 12, pp 24) which Nadirshah withdrew. It would be seen that within 30 days of the receipt of notice under Section 12(2), C.C. Trivedi took positive steps for payment of rent and Nadirshah in fact received the payment within 30 days of the service of the notice of C.C. Trivedi.

10.16 It is submitted that on 4.5.1977 Nadirshah filed the suit to recover arrears of Rs. 9000/- at Rs. 250/- per month for three years preceding the suit. This would cover rent from March to April 1977 for which there was no demand under Section 12(2). He contended that if C.C. Trivedi is protected under Section 12(2) there is no need to claim protection under Section 12(3)(b) of the Act. He further contended that Section 12(3)(a) of the Act is not applicable as the rent is not payable by month and further on the ground that there was no neglect to pay. In rent Application No. 570 of 1971 dispute as to standard rent does not arise.

10.17 He further contended that in view of Section 12(3)(b) of the Act, C.C. Trivedi had already paid full areas of rent. In fact if the standard rent is Rs. 75/- per month or Rs. 100/- per month C.C. Trivedi had over paid his rent due to Nadirshah. Therefore there was no question of breach of Section 12(3)(b) of the Act. He submitted that judgement in the case of NANJI PANCHAL VS. DAULAL in this regard reported in 11 GLR 285 the Court's duty is to regularise payments.

11. Grounds of sub-letting: The ground of subletting arises only in Regular Civil Suit No. 404 of 1971 from which Civil Revision Application 1091 of 1979 arose. He submitted that the landlord Nadirshah alleged that C.C. Trivedi has sublet the suit premises to the following persons:

1. R. Chimanlal Trivedi
2. Janak Silk Factory
3. Ramesh Silk Factory
4. Bandhu Silk Factory

11.1 He submitted that Nadirshah had already made the same allegations in Regular Civil Suit No. 721 of 1964 which resulted into consent decree dated 17.10.1968. He further contended that C.C. Trivedi is son of R. Chimanlal Trivedi, and a partner of Bandhu Silk Factory. He submitted that permitting the firm of which the tenant is a partner is not subletting. He submitted that in subletting the transfer of exclusive possession is sine qua non for creating subtenancy for which he has relied on the following decisions:

1. MEHTA JAGJIVAN VANECHAND VS. DOSHI VANECHAND HARAKHCHAND & ORS. reported in 12 G.L.R. 487 in which on page 489 at para 5 it is observed as under:

"Para 5 Whether or not it will constitute subletting may now be examined. Sub-letting postulates two distinct persons-the head-tenant and the sub-tenant. Their rights and obligations are different. One cannot be one's own sub-tenant. If the transaction of taking in partners constitutes sub-letting, the defendant-tenant will be head-tenant and he himself along with his two partners will be the sub-tenants. It is not necessary to uncover the fallacy in this track of reasoning any further. As it is not feasible to accede to the argument

that the partners of a partnership firm constitute a legal entity having a distinct identity, individuality, or personality, it is not possible to hold that a transfer has taken place from the tenant to himself and to two others (his partners). The contention cannot therefore be upheld that a sub-tenancy has come into existence between the tenant on the one hand and the tenant and his partners on the other."

2. DEV KUMAR VS. SWARAN LATA reported in AIR 1996 SC 510 in which at para 9 on page 512 the Hon'ble Supreme Court has held as follows:

"Coming to the second question the expression 'sub-letting' has not been defined in the Act. The conclusion on the question of sub-letting is a conclusion on a question of law derived from the findings on the materials on record as to the transfer of exclusive possession and as to the said transfer of possession being for consideration. As to what is the true meaning of expression 'sub-letting', this Court considered the same in the case of Jagdish Prasad Vs. Angoori Devi, (1984) 3 SCR 216: (AIR 1984 SC 1447), in an eviction proceeding under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. The Court held that merely from the presence of the person other than the tenant in the shop, subletting cannot be presumed and as long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, subletting flowing from the presence of the person other than the tenant in the shop cannot be assumed. It was further held that in an application for eviction of a tenant from a shop which is based on the allegations that the premises has been sublet, the allegation has to be proved. The question of sub-letting was considered by this Court in the case of M/s. Shalimar Tar Products Ltd. Vs. H.C. Sharma (1988) 1 SCR 1023: (AIR 1988 SC 1445), and it was held that in order to construe subletting there must be parting of legal possession of the lessee and parting of legal possession means 'possession with the right to include and also right to exclude others'."

11.2 He further submitted that under the law as well as clause (5) and (6) of the Rent Note C.C. Trivedi was

competent to let out superstructure owned (purchased or built) by him. He has further submitted that concept of dual ownership of land and superstructure is recognised. If the superstructure belongs to the tenant and he lets the same it is not subletting. For that purpose he has relied on the following decision:

1. MRS. DOSSIBAI VS. KHEMCHAND reported in AIR 1966 SC 1939 in which on page 1941-1942 at paras 11 and 12, it is observed thus:

"Para 11 - It is unnecessary for us to decide whether if there is no contract to the contrary, S. 15 will really stand in the way of a lessee of the land letting out buildings constructed by him on such land. We may say however that there is in our opinion much force in the argument which found favour with the Bombay High Court in Vinayak Gopal Vs. Laxman Kashinath, ILR (1956) Bom. 827: (AIR 1957 Bom. 94), where the very question which is now before us arose for decision that the bar of Section 15 will operate only in the way of letting out the land of which lease has been taken, but will not stand in the way of letting the building constructed on the land.

Para 12 - In that case the Bombay High Court held that where land is leased for the purpose of construction of buildings for residence the land is 'let for residence' within the meaning of Section 6 of the Rent Act. Mr. Bhatt devoted a considerable part of his argument to persuade us that some of the reasons given in that judgement do not stand scrutiny. We think it is unnecessary however to examine whether all the reasons given in the judgement are correct. For, as already indicated, the words 'let for residence' on a proper construction would cover the case of open land being let for construction of residential buildings and so the conclusion reached by the Bombay High Court in Vinayak Gopal's case, ILR (1956) Bom. 827: (AIR 1957 Bom. 94), is, in our opinion, correct."

11.3 He further submitted that the alleged sub-tenancies would be protected under Section 15(2) of the Bombay Rent Act as the same were created before 21.5.1959.

11.4 Regarding change of user: This ground arose only

in Regular Civil Suit No. 404 of 1971 i.e. in Civil Revision Application No. 1091 of 1979. He contended that change of user must be destructive for a person acquires under the change of use he can seek eviction on that ground only. For that purpose he has relied on Section 13(1)(a) of the Rent Act read with Section 108(o) of the Transfer of Property Act and also relied on the following decisions:

1. MOHAN LAL VS. JAI BHAGWAN reported in AIR 1988 SC 1034 in which on page 1037 at para 9 the Hon'ble Court has held thus:

"In the background of the purpose of rent legislation and inasmuch as in the instant case the change of the user would not cause any mischief or detriment or impairment of the shop in question and in one sense could be called an allied business in the expanding concept of departmental stores, in our opinion, in this case there was no change of user which attracts the mischief of S. 13(2)(ii)(b) of the Act. The High Court, therefore, was in error."

2. BABUBHAI BHURABHAI (SINCE DECEASED) BY HIS HEIRS & LRS. JAGJIVAN BABULAL & ANR. VS. PARMANAND NATHALAL VAGHELA & ANR. reported in 30(1) G.L.R. 517 in which on page 522 at para 5, it is observed as under:

" The words 'permanently injurious thereto' would necessarily connote causing permanent injury to the demised property. Therefore, it is difficult to agree with the general proposition canvassed by Mr. Hathi, for the respondents that if portions of demised premises which are shop on the ground floor have not suffered any permanent injury by putting up of the offending door in the eastern wall of the suit shop by the defendant, if that act has made any damage to other property of the lessor in lessor's possession, the lessee would become liable to be evicted under last part of Sec. 108(o) of the Transfer of Property Act. On proper construction of Sec. 108(o) of the Transfer of Property Act, it must be held that the Court must find that the offending act of the lessee is destructive or permanently injurious to the demised premises. The words 'permanently injurious thereto' must be held to connote permanently injurious to the demised premises. It is, therefore, obvious that if the plaintiff's case is based on the aforesaid provision, it has

to be established by him that the defendant by putting up door of larger size in the eastern wall of the suit shop had committed an act which was permanently injurious to the suit shop. Unfortunately, nowhere in para 13 of the judgement of the appellate Court, such a finding is found to have been reached."

12.1 He further submitted that in view clause (5) and (6) of the Rent Note the only prohibition in the rent note is from using double load for running machine which caused damage. He contended that the plaintiffs allegations are that the bungalow was allowed for respondents to use for office and godown and the bathroom on the ground floor are used as godown and that the defendant was running a factory in part of the bungalow. He submitted that the trial court did accept the plaintiff's case but the appellate court confirmed the trial court's view and further held that the plaintiff was estopped from raising this contention.

12.2 Regarding Erection of permanent structure on demised premises - This ground falls for consideration only in Regular Civil Suit No. 404 of 1997 and Civil Revision Application No. 1091 of 1979. He submitted that balcony and floor was used as bathroom. However, loft was not permanent structure. He submitted that defendant has admitted that he had raised parapet wall in southern lobby upto the ceiling and covered the lobby into a room and placed door at one end of the lobby. Lobby covered by its predecessor in title. It is submitted that corrugated iron sheet wall is placed in wooden frame which can be easily removed without causing any damage. Two basket type latrines had existed outside. On receipt of notice from the Municipal Corporation, plaintiff converted one in flush type latrine, the defendant did the same on the other latrine. Under the terms of the rent note, C.C. Trivedi had a right to put up new structure in place of one purchased from the tenant. He further submitted that some allegations were made in Regular Civil Suit No. 721 of 1964 which resulted into consent decree dated 17.10.1968. For that purpose he has referred to plaint in Regular Civil Suit No. 729 of 1964 and the allegations made therein.

12.3 Learned counsel for the petitioners relied on plaint No. 729 of 1964. He submitted that in that suit paragraph No. 3 construction of office and godown, para 4 refers to pucca construction in place of superstructure purchased from the previous tenant and para 5 refers to

demolitions and permanent alterations without taking municipal permission. It also refers to construction of latrine is the only new ground. He has relied on the decision of the Hon'ble Supreme Court in the case of OM PRAKASH VS. AMAR SINGH reported in AIR 1987 SC 617 where the apex court held that high wall on parapet to ceiling and making of tin shed is not permanent structure. He has submitted that placing of rolling shutter and loft is not permanent structures. He further contended that there must be allegation and proof of diminution of value of building for that he has relied on 1995 Supp 3 SCC 459. He also stated that there is burden on the landlord to prove that permanent structures have been made by the tenant. For that purpose he has relied on the decision in the case of OM PAL VS. ANAND SWARUP reported in 1988(4) SCC 545. He further submitted that this is not a case where this court should interfere in revision and for that purpose he has relied on the following decision:

1. ARZA ABDULLA VS. ASIATIC OXYGEN & ACETYLENE CO. LTD. reported in 1995 Supp. (4) SCC 398. On page 400 at para 6 the Hon'ble Supreme Court has observed thus:

"Whether or not the erection of the structures was subsequent to the relevant date and whether or not such construction was of a permanent character, is a question of fact and that question had been determined by the fact-finding authority, namely, the trial court. The finding of the trial court, as stated earlier, was undoubtedly in favour of the landlord. On the facts and in the circumstances of this case, the High Court was in error in interfering with the findings of the trial court."

12.4 Regarding denial of title - This ground arose only in Small Rent Suit No. 470 of 1977 (C.R.A. No. 1328 of 1987). He submitted that consent terms providing inter alia that Nadirshah had to clear his title. He further submitted that the correspondence calling upon Nadirshah to clear his title. He further stated that on 17.10.1969 Nadirshah failed to obtain advocate G.U. Patel's decision about title clearance. In view of the same, C.C. Trivedi filed the suit for specific performance and stated that he was ready and willing to buy title and share in the suit property which Nadirshah had. Nadirshah in his written statement in the suit for specific performance contended that there were other heirs of Pirozshah, that the property did not belong to him alone and that he had let the property as a Manager.

The consequence of this averment is that the plaintiff himself did not claim to have let the property in his own right as a owner but claimed that he had let the property as a Manager of all co-owners. If so, C.C. Trivedi saying the same cannot amount to denial of title of the landlord. He further submitted that in Regular Civil Suit No. 404 of 1971 Nadirshah filed previous eviction suit but did not claim any decree of eviction on the ground of denial of title. In C.R.A. No. 1091 of 1979 in the written statement C.C. Trivedi has stated that the plaintiff was not the exclusive owner. However, Shri Nadirshah did not amend the plaint in Regular Civil Suit No. 404 of 1971 by inserting the ground of denial of title. It was submitted that he had accepted that position that he had no full title to the suit property. On 28.2.1977 the Trial Court dismissed Regular Civil Suit No. 404 of 1971 for eviction and thereafter on 3.3.1977 Nadirshah addressed a notice demanding rent and possession. On 11.3.1977 C.C. Trivedi replied to Nadirshah's notice denying that Nadirshah was the full owner of the property. In March 1977 C.C. Trivedi filed interpleader suit being Regular Civil Suit No. 306 of 1977 and on 4.5.1977 Nadirshah filed the Small Rent No. 470 of 1977 claiming possession on the ground of denial of title. This is a case where the landlord himself has asserted lack of title. In this connection reliance is placed on the decision in the case of GURUSWAMI VS. RANGANATHAN reported in AIR 1954 Madras 402. To entitle the landlord for a decree for eviction the denial of title must lack bona fide. Reliance is also placed on the decision in the case of M. SUBBARAO VS. P.V.K. KRISHNA RAO reported in AIR 1989 SC 2187 in which on page 2190 at para 5 the Hon'ble Apex Court has held as under:

"As observed by the Punjab and Haryana High Court to insist that a denial of title in the written statement cannot be taken advantage of in that suit but can be taken advantage of only in a subsequent suit to be filed by the landlord would only lead to unnecessary multiplicity of legal proceedings as the landlord would be obliged to file a second suit for ejectment of the tenant on the ground of forfeiture entailed by the tenant's denial of his character as a tenant in the written statement."

12.5 In this case denial by C.C. Trivedi does not lack bona fide. In fact it follows the assertion by the landlord himself that he was only a co-owner and not full owner and further he had let the premises in his capacity as a Manager for the co-owners. Moreover, the suit for

specific performance was pending. The denial by C.C. Trivedi of the Nadirsha's full ownership of the demised premises was not with any ulterior or mala fide intention of denying or delaying Nadirshah's right to recover rent or possession, but the same was to protect his own interest by filing the interpleader suit in which he deposited the arrears of rent. In this connection, the learned counsel has relied on the decision of the Hon'ble Supreme Court in the case of RAJA MOHAMMAD AMIR AHMAD KHAN VS. MUNICIPAL BOARD OF SITAPUR AND ANOTHER reported in AIR 1965 SC 1923. In para 11 at page 1928 it is held thus:

"It was also clear law that permanent tenancies are within the rule and are liable to forfeiture if there is a disclaimer of the tenancy or a denial of the landlord's title. That the disclaimer or the repudiation of the landlord's title must be clear and unequivocal and made to the knowledge of the landlord is also beyond dispute."

12.6 He therefore submitted that filing of an interpleader suit is not a denial of landlord's title.

GROUND OF PERSONAL REQUIREMENTS:

13 This ground arises only in Small Rent Suit No. 470 of 1977 (C.R.A. 1328 of 1987 of C.C. Trivedi and C.R.A. No. 988 of 1988 of Nadirshah). The decree under revision is a partial decree of eviction limited to the bungalow on the ground that Nadirshah required the same for residential purposes. The business requirements of Nadirshah have been rejected. As submitted with reference to the ground of denial of title it is submitted that if the decree for specific performance of the agreement to sell in favour of C.C. Trivedi is confirmed by the High Court, his right to get possession from Nadirshah as a tenant. Section 13(1)(g) confers a right on the landlord to recover possession only if the landlord requires the entire demised premises for personal requirements. Only if the landlord requires the demised premises in entirety question of passing a partial decree for eviction on the ground of no hardship would arise under Section 13(2) of the Rent Act. As held by this Court in the case of M.N. CHANAWALA VS. B.D. GADARIA reported in 1993(1) G.L.R. 423, the question of a comparative hardship must be considered and only thereafter the question of no hardship is to be considered. In the present case the lower appellate court found that the plaintiff required only a part of

the demised premises, namely, bungalow for residence, but did not require the remaining part of the demised property on that very finding the requirements of Section 13(1)(g) are not met and if so no question arises on going to Section 13(2) of the Rent Act.

13.1 He further submitted that there is no question of decree for partial eviction unless the plaintiff has pleaded for such partial decree of eviction. The plaintiff must plead that no hardship would be caused to either side if a decree is passed for a specified portion of the demised premises. In the present case the plaintiff has not made out any such case in the plaint. The trial court did raise any such issue and the tenant had no opportunity to lead any evidence on this aspect. Even in the memo of appeal the plaintiff has not pleaded for a partial decree of eviction or taken any ground that the trial court should have passed a decree for partial eviction. It was not open to the trial court to make out a new case for decree for partial eviction in absence of any pleading or case of the plaintiff to that effect.

13.2 The lower court has negatived the plaintiff's alleged requirement for business on sound reasons and no interference by the High Court under Section 29(2) of the Rent Act is called for. Therefore, to that extent Civil Revision Application 988 of 1988 must be dismissed.

13.3. He further submitted that the requirement must be bona fide and yet not reasonable. Reliance is placed on the decision in the case of M.S. ZAHED VS. K. RAGHAVAN reported in (1999) 1 SCC 439). He contended that in order that the requirement is bona fide claim must be made in good faith and not for ulterior reason which is for increasing rent or selling the property. The Trial Court has found that the plaintiff had never any intention to settle at Surat, that the plaintiff, his son-in-law and two daughters and wife of the plaintiff were residing in the flat in Vikram Society as members of the family, that from the beginning the landlord kept the tenant on tenterhooks and in the court, that the plaintiff increased the rent to Rs. 175/- in the year 1961 and again settled his claim for eviction for the higher rent of Rs. 250/- per month giving up cause of personal requirement. He contended that the plaintiff wanted to sell the property to the defendant for Rs. 55,000/and therefore his demand on grant of personal requirement was not genuine and bona fide. The trial court has considered in detail the correspondence etc. between the parties. The lower court did not apply its mind to the relevant facts in this behalf.

13.4 He submitted that the appellant court has incorrectly observed that the trial court has not considered that the plaintiff was to retire and had retired and lost his accommodation and possession was a subsequent development. In fact, the trial court has considered this aspect in this behalf.

13.5 The appellate court contrary to the record and on the mere fact that the plaintiff vacated his quarter and stayed with Fernandes came to the conclusion that the plaintiff has no other property to reside. The trial court has considered this aspect in detail and came to the conclusion that the plaintiff, his wife and his unmarried daughter, his married daughter and son in law were all residing together as one family. The appellant court did not record any finding on the contentions that the plaintiff wanted to increase the rent and issued several notices, filed suit for eviction and compromised the same to get higher rent. The relevant facts considered by the trial court have not been considered and no finding was recorded. The appellate court found that the requirement of plaintiff for residence was proved on the sole ground that the plaintiff had to leave the accommodation of his friend Fernandes.

13.6 It was submitted that the appellant court did not consider the circumstances relied upon by the trial court in its judgement in support of the conclusion that the plaintiff had no desire to settle in Surat.

13.7 He submitted that the court did not record any finding on the contentions that all along the plaintiff had sued the defendant for eviction on several grounds. But compromise the same against the agreement by the tenants to purchase the property and to pay higher rent. The trial court failed to consider that plaintiff is not a truthful witness, that he had suppressed the release deed of 1960, falsely alleged that he had experience as a motor mechanic, falsely stated that he was suffering from spondylitis, asthma and blood pressure and the fact that he was residing with his daughter Navaz and her husband.

14. ORDER 23 RULE 3A of C.P.C. - Order 23 Rule 3A of C.P.C. was inserted by the Amendment Act of 1976 with effect from 1976. It has no application to Regular Civil Suit No. 89 of 1971 filed on 20.1.1971 from which the Second Appeal arises. Order 23 Rule 3A was not in existence when the suit was filed in 1971.

15. He further submitted that consent decree can be challenged on the ground of fraud. Reliance is placed on the decision in the case of STATE OF PUNJAB VS. GURDEV SINGH reported in AIR 1991 SC 2219

16 He further submitted that even the ultra vires and void action remains operative till it is set aside. Therefore, it is competent to file a suit to set aside a consent decree which is nullity. Reliance is placed on the decision in the case of STATE OF ORISSA VS. BRUNDABAN SHARMA reported in AIR 1995 Supp. 3 SCC 249

17.1 He stated that ultravires and void action can be challenged. In this connection, the learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of SUBBA RAO VS. JAGANNADHA RAO reported in AIR 1967 SC 591 in which on page 595 at para 10 it is observed as follows:

"The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the court could be res judicata, whether statutory under S. 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests."

17.2 He further submitted that consent decree does not create res judicata because the requirement of 'heard and finally decided' is not met by a consent decree. Though consent decree may in a given case give rise to estoppel by conduct, a consent decree fixing standard rent cannot create estoppel for the following reasons.

17.3 There is no estoppel against statute. Estoppel cannot override the law of the land. He has invited my attention to the following decision:

1. MADDANAPPA VS. CHANDRAMMA reported in AIR 1965 SC 1812 at paragraph 6 it is observed thus:

"We find it difficult to construe the conduct of the first defendant in not replying to the notice and in not cooperating with the plaintiff in instituting a suit for obtaining possession of the properties, as justifying the inference of

estoppel. It does not mean that she impliedly admitted that she had no interest in the properties. It is true that in Ex. 15 which is a letter sent by her on 17th January, 1941, to her step mother she has observed thus:

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But even these statements cannot assist the appellants because admittedly the father knew the true legal position. that is to say, the father knew that these properties belonged to Puttananjamma and that he had no authority to deal with these properties. No doubt, in his written statement Maddanappa had set up a case that the properties belonged to him by virtue of the declaration made by Puttananjamma at the time of her death, but that case has been negatived by the courts below. The father's possession must, therefore, be deemed to have been, to his knowledge, on behalf of the plaintiff and the first defendant. There was thus no possibility of an erroneous belief about his title being created in the mind of Maddanappa because of what the first defendant had said in her letter to her step mother".

Again at para 9 it is further observed thus:

"The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the representation."

18. Mr. S.M. Shah, learned counsel for the respondent landlord submitted the following points.

19.1 As regards submission of maintainability of second revision, he has stated that the same is contrary to settled legal position by this High Court in the case of PARMAR BHIMJI GOVIND VS. PATEL VELJI RAMJI reported in 1996(1) G.L.H. 606. The learned counsel for the respondent landlord further stated that consent term is not agreement to sell but is only deciding matters of eviction suits in which they were filed and consent decree thereon came to be passed. He contended that what is agreed is that the tenant to hand over possession by the date specified therein and to that eviction decree

certain rider is provided. Before that date the tenant purchases the suit property by paying Rs. 55,000/- and getting sale deed. He submitted that the landlord will not have right to get possession of the suit premises on the basis of the consent decree and if sale deed is not executed by 17.10.1969 and the tenant has in the event of his dispute title of the landlord not clear, the tenant will get that dispute resolved by date 17.9.1969 by advocate Shri Govind U. Patel. If the landlord does not clear the title on the said advocate deciding that title is not clear and that the tenant is ready to pay sale consideration of Rs. 55,000/- then the landlord will not be entitled to get possession of the suit premises on the date, namely, 17.10.1969. He also submitted that the landlord will have to continue the defendant tenant as tenant at Rs. 250/- per month as standard rent for the suit premises as per the condition of the Rent Note dated 8.1.1959. These consent terms have after providing all these provided that it will be open to parties to consent terms to sue defaulting party to enforce the term of continuing the tenant at the rent of Rs. 250/- per month. He further submitted that the landlord can sue defendant-tenant for enforcing agreement to pay Rs. 250/- per month. In other words, either party can sue for specific performance of this agreement of lease of suit premises at Rs. 250/- per month. The defendant-tenant can file suit for getting sale deed for suit premises as consent terms clearly require payment of Rs. 55,000/- by tenant to the landlord or he deposits Rs. 55,000/- in Court by 17.10.1969 for the tenant getting sale deed and thus payment or deposit of Rs. 55,000/- by 17.10.1969 is condition precedent for getting sale deed. It is further submitted that if the tenant is ready and willing to pay consideration of Rs. 55,000/and has deposited it in court and the landlord does not clear title of the suit premises even after dispute about clear title, if raised by the tenant and that dispute is received against the landlord before 17.9.1969 then the landlord cannot get possession of suit premises on 17.10.1969 and defendant tenant has to be continued as tenant at Rs. 250/- per month as standard rent. It was further submitted that the tenant will get the dispute resolved by 17.9.1969 by advocate Shri Govind U. Patel and the landlord does not clear the title on the said advocate deciding that title is not clear and that the tenant is ready to pay sale consideration of Rs. 55,000/- then the landlord will not be entitled to get possession of the suit premises as on 17.10.1969. It was also submitted that the landlord will have to continue the defendant-tenant as tenant at Rs. 250/- per month as standard rent for the suit premises as per the condition

of the Rent Note dated 8.1.1959. Reliance is placed on the following decision:

1 POPATLAL RATANSEY VS. KALIDAS BHAVAN reported in AIR 1958 Bombay 1 in which on page 4 at para 5 it is held thus:

"We are not impressed by these submissions of Mr. Jethmalani. Standard rent cannot be a constant figure. Standard rent depends upon circumstances, and as circumstances change, the standard rent would also vary. There can be no immutability about it. Besides, the tenant having once given the Court to understand, to the satisfaction of the Court, that he considered the rent proposed by the landlord during trial or appeal to be a just and reasonable standard rent which was acceptable to him and having invited the Court to decide the question accordingly and incorporate the decision in its decree, it would not be open to him to say subsequently, as between the same parties and in respect of the same premises, that the previous decision of the Court would not bind him."

20. The learned counsel for the landlord submitted that as regards eviction suit, the lower court has decreed the suit on the ground of bona fide and reasonable requirement of the landlord. He submitted that it is pure question of fact and finding of lower court on this fact of requirement that tenant is liable to handover vacant possession is final and binding and the same cannot be interfered with in the revisional jurisdiction. He has relied on the judgement of the Apex Court in the case of SARLA AHUJA VS. UNITED INDIA INSURANCE CO. LTD. reported in AIR 1999 SC 100. He submitted that the revisional court has very limited jurisdiction to interfere with the finding of fact. He therefore submitted that tenant's revision application against eviction decree has to be rejected and there cannot be any reappraisal of evidence.

20.2 In view of the same, C.R.A. No. 1328 of 1987 filed by the tenant requires to be confirmed. He submitted that this is clear case for passing decree for possession in the matter of eviction suit. He further submitted that as regards bona fide requirement case as per the provisions of law, the court will have to consider the case of requirement and on its proof, court has to consider about hardship and while doing so, the court will consider the matter about no hardship to

either if partial decree is passed. These steps are required by provisions of law and not on the basis of plea as regards hardship and no hardship as provided by Section 13(2) of the Bombay Rent Act but the tenant is not satisfied by partial decree, decree for possession of entire suit premises had to be passed as it is found that tenant has no hardship if suitable bungalow is ordered to be vacated as the tenant has obtained premises and accommodation elsewhere. In view of the same passing only partial decree cannot be made basis for challenging the decree passed.

20.3 The learned counsel further submitted that the conduct of the tenant of filing interpleader suit and continuing with it even now is itself proof of denial of title of the landlord. He submitted that when the rent note and consent decree are only with the landlord who has filed the suits for possession and conduct of not paying the rent to the plaintiff landlord and depositing various amounts for rent in the interpleader suit is a proof of case for decree for possession on the ground of non-payment of rent.

21.1 As regard eviction decree, both the courts have considered the provisions of the Rent Act, the question of fact by the landlord and the tenant and court passed decree for eviction on some principle of law. This court has no jurisdiction to reappreciate the said findings on record and therefore I do not see any reason to interfere with the said finding of the court regarding eviction suit.

21.2 Regarding permanent structure when the defendant has raised parapet wall. The defendant has also put corrugated iron sheet. In view of the same, it cannot be called that tenant has erected permanent structure.

21.3 As regards denial of title the defendant has filed interpleader suit. It is stated that he has denied the title of the landlord.

21.4 In my view the finding of the appellate court regarding passing of partial decree in respect of bungalow is legal and held that in that case the tenant will not suffer any hardship if bungalow is ordered to be vacated.

21.5 In my view the tenant has raised contention that fixation of standard rent is without jurisdiction. However, in this case I am passing the decree only on the ground of bona fide and reasonable requirement of the

landlord and I am not passing any decree on the ground of arrears of rent and therefore, I am not examining the contention of the tenant in this behalf.

C.R.A. 821/79 with C.R.A. 1091/79:

22 As regards the above Civil Revision Applications (subject matter of Civil Suit No. 404 of 1971 Regular Civil Appeal No. 97 of 1977) I have gone through the order of the trial court as well as the appellate court and I agree with the finding of the appellate court that the suit notice is legal and valid in view of Section 106 of the Transfer of Property Act. I also agree with the finding of the learned appellate judge that the respondent has merely raised a parapet wall and even though he removed the same, no damage is resulted to the suit property. As such, the construction made by the respondent in the southern lobby of the suit property cannot be said to be permanent alteration as contemplated under the Act. I also agree with the learned appellate judge that reconstruction does not amount to permanent alteration in the property as contemplated under Section 13(1)(c) of the Bombay Rent Control Act.

C.R.A. No. 988/1988 with C.R.A. No. 1328 of 1987

23 These matters pertain to Small Rent Suit No. 470 of 1977 which was filed by Nadirshah Pirozsha Dalal. In that case the trial court after considering the facts and circumstances of the case was pleased to dismiss the suit of possession of the plaintiff against the defendant.

24 Being aggrieved and dissatisfied with the aforesaid judgement, the appellant filed appeal being appeal No. 370 of 1982. The appellate court after considering the entire evidence on record was pleased to confirm the finding of the trial court.

24.1 As regards landlord's reasonable and bona fide requirement of possession of the suit property, both the courts below have come to the conclusion that the landlords is entitled to possession of the suit premises in his own rights and the tenant's rights are deemed to have come to an end and the requirement ought to be present when the suit is filed and should continue to subsist till the date on which decree is passed and if necessary, in each and every case. It was submitted that Nadirshah has retired and lost his accommodation and possession and therefore also he requires suit property bona fide and reasonably. It was the contention of

Nadirshah that formerly he was in defence serving in Central Government at Bombay and for some time he was in Delhi. However, after his retirement he vacated Government quarters. When the appeal was going on before the appellate court it was stated that he has no accommodation to reside with his family. So he is in help of his friend and staying in his quarter along with his family. The court came to the conclusion that requirement of Nadirshah pertaining to the residence apparently appears to be natural and probable. It was stated that requirement of the plaintiff apparently appears to be bona fide and reasonable. It was held that more over it is clear that Nadirshah was staying at some other place is no ground to doubt his bona fide requirement and there is nothing wrong in claiming possession on the ground of bona fide requirement. It was held that defendant tenant has a land at Bhestan and also at Katargam and the said land can be used for his business purposes. It was held that the defendant tenant has sufficient accommodation for his residence and if the decree for eviction regarding suit bungalow is passed in favour of the plaintiff who is actually in need of residential accommodation and whose requirement pertaining to residence is bona fide and reasonable and hence the appellate court held that defendant tenant is not able to get other suitable place for his business. So except the bungalow, the open land upon which the business of the defendant is running as the defendant's whole family is depending upon such business and he is not able to get other accommodation for his business, so decree pertaining to that portion appears to be legal. So the appellate court passed partial decree regarding suit bungalow and did not give possession regarding suit premises.

24.2 In doing so, the court has considered Section 13(1)(g) which provides that no decree for eviction shall be passed if the court is satisfied that having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant greater hardship would be caused by passing the decree than by refusing to pass it. The court has also considered proviso to sub-section (2) In spite of this the court passed decree in respect of such part only. In view of the same, the decree of the appellate court cannot be interfered with in this behalf.

24.3 However, the appellate court held that the plaintiff has retired from Government service and after his retirement he has no other accommodation to stay with

his family and he wanted to settle in his home town and the requirement of the plaintiff appears to be bona fide and it is clear from the evidence that after retirement from the service the plaintiff wants to shift to his parental house at Surat. So the possession of the suit premises is a bona fide requirement of the house as he has no other accommodation to say. As regards hardships the learned appellate judge held that the defendant is carrying on business and the entire family of the defendant depends upon the business carried on by the defendant and therefore except bungalow the learned appellate judge did not grant any decree for possession. As regards hardships it was held that plaintiff has greater hardship if the decree of possession is not passed and the court finds that the requirement of the appellant landlord is bona fide and reasonable and therefore he is entitled to get decree of eviction. It was held that the defendant has land in Bhestan and also at Katargam and the said lands can be used for his business purpose. The court further held that the plaintiff is entitled to file the suit. Therefore, the learned appellate judge was pleased to set aside the finding of the trial court regarding bona fide and reasonable requirement and confirmed the remaining portion of the judgement of the trial court. The appeal was partly allowed and decree of eviction pertaining to suit bungalow is passed in favour of the plaintiff as the requirement is bona fide and reasonable.

24.4 I have gone through the judgement and findings of both the courts below. I have also gone through the record. I have also gone through the submissions made by the learned advocates for both sides. In my view the findings of the appellate court that requirement of the landlord is bona fide and reasonable is based on cogent and convincing reasons and is based on appreciation of facts and therefore under Section 29 of the Bombay Rent Act it will not be possible for me to interfere with the said finding of the appellate court and I therefore confirm the findings of the appellate court that requirement of the landlord is bona fide and reasonable. To that extent revision application No. 988 of 1988 filed by the appellant is also rejected and the revision application No. 1328 of 1987 by tenant assailing the said finding is also rejected and confirmed the findings of the appellate court in this behalf.

II SECOND APPEAL NO. 252 OF 1979:

25.1 Shri C.C. Trivedi tenant (original plaintiff) had filed this second appeal against the judgement and

decree dated 30.12.1978 passed by the Extra Assistant Judge, Surat, in Regular Civil appeal No. 85 of 1977. The learned judge by his impugned judgement was pleased to dismiss the appeal filed by Shri C.C. Trivedi tenant in this behalf. The learned judge was pleased to confirm the judgement and decree dated 8.2.1977 passed by the Civil Judge (S.D.) wherein the learned trial judge was pleased to dismiss the suit of the plaintiff.

25.2. The facts giving rise to the second appeal are as under:

25.3 In the present suit the plaintiff sued against Nadirshah P. Dalal or defendant landlord for a declaration that the standard rent fixed for the suit property at Rs. 250/per month is increased by fraud and it is not the standard rent of the suit property and the decree passed in Regular Civil Suit No. 729 of 1964 by Joint Civil Judge (Junior Division) has been obtained by fraud. He has further prayed for fixing the standard rent of the suit property and for the costs of the suit.

25.4 It was further averred that the appellant plaintiff is a tenant of the property bearing Nonth No. 1236 of ward No. 7 situated at Variyavi Bazar, Surat. The respondent-landlord has filed Regular Civil Suit No. 729 of 1964 against the plaintiff that in the said suit a compromise was arrived at between the parties on 17.10.1968 and a decree in terms of compromise was passed therein. The plaintiff contended that in the said suit the defendant agreed to sell him the suit property for Rs. 55,000/- and represented to him that he is to sell the property to him within one year and he was agreed to raise the standard rent of the suit property to Rs. 250/- per month. He contended that as there was a question of one year only, he agreed to pay the standard rent at the rate of Rs. 250/- per month. He contended that on the said promise advanced by the defendant, he entered into a compromise in Regular Civil Suit No. 729 of 1964. He then contended that thereafter he called upon the defendant to execute the sale deed when he told him that he alone was not the owner of the suit property and other owners do not agree to execute the sale deed. He contended that it was the intention of the defendant from the beginning not to abide by the terms of the compromise filed in Regular Civil Suit No. 729 of 1964. He therefore contended that the decree passed in Regular Civil Suit No. 729 of 1964 is obtained by fraud and the same is null and void. He contended that the standard rent fixed therein by the court was not decided on merits and it is not a standard rent fixed by the Court as

contemplated in law. He therefore filed Regular Civil Suit No. 89 of 1971 for declaration that the decree passed in Regular Civil Suit No. 729 of 1964 so far it related to the fixation of the standard rent is obtained by fraud and so the same is illegal and void and also for fixing the standard rent of the suit premises.

25.5 In the said suit original landlord defendant has filed written statement Exh. 11 contending that the suit is not tenable and deserves to be dismissed. It was stated that the landlord had let out the suit property to the plaintiff for Rs. 175/- per month and before that the suit property was let out to Sundarlal Choksi at Rs. 75/- per month. The landlord denied that he wanted to sell the suit property hence he had talked about the same with the plaintiff. In fact, no special correspondence was ensued with the plaintiff to sell the suit property to him but as he was the tenant he might have written to him, if he wanted to purchase the suit property at the valuation which he may quote. He has denied that with a view to bring undue force on the plaintiff he filed a false suit No. 729 of 1964 in which a compromise was arrived at on 17.11.1968 by fraud whereby he had agreed to sell the suit property to the plaintiff for Rs. 55,000/-. The landlord further denied that rent of Rs. 250/- was fixed on the representation that he will sell the suit property for Rs. 55,000/- within one year and that he cannot maintain himself from his salary and question of rent is only for one year. He has also denied that the plaintiff relied upon his word and increased the rent to Rs. 250/per month.

25.6 The learned Civil Judge (Senior Division) by his judgement and decree dated 8.2.1977 was pleased to hold that the standard rent of the suit property cannot be fixed in the said suit. The court further held that the plaintiff failed to prove that under the guise of selling the suit property the defendant had obtained fraudulently the consent decree in Regular Civil Suit No. 729 of 1964 on 17.10.1968. The Court further held that the plaintiff failed to prove that the decree in Regular Civil Suit No. 729 of 1964 is obtained by fraud. The court further held that the plaintiff has failed to prove that compromise decree is illegal and void. It was further held that suit claim is not barred by res judicata and the plaintiff is not entitled to declaration as prayed for in the suit.

25.7 Being aggrieved and dissatisfied with the aforesaid judgement and decree of the learned trial judge Shri C.C. Trivedi filed Regular Civil Appeal No. 85 of

1977 before the Court of Extra Assistant Judge, Surat against Nadirsha P. Dalal. The Extra Assistant Judge by his judgement and decree dated 30.12.1978 was pleased to hold that the suit of the plaintiff is not maintainable. However, the learned appellate judge held that the trial court has not erred in holding that the plaintiff has failed to prove that the decree passed by the compromise in Regular Civil Suit No. 729 of 1964 was obtained by fraud.

25.8 Being aggrieved and dissatisfied with the aforesaid judgement and decree, Shri C.C. Trivedi filed Second Appeal No. 252 of 1979 before this court which was filed somewhere in July, 1979.

26.1 The learned counsel for the appellant Mr. S.B. Vakil submitted that this appeal raises important question of law as to whether the agreement between the parties recorded in Regular Civil Suit No. 729 of 1964 under which rent was enhanced from Rs. 170/- to Rs. 250/- per month was unlawful under Section 7 or any other provisions of the Bombay Rent Act.

26.2 He further submitted that if the aforesaid action is found to be unlawful, there is effect on the entire agreement.

26.3 He further submitted that the lower court have misread and misinterpreted the consent decree Exh. 33 Regular Civil Suit No. 729 of 1964. He further submitted that the lower courts have erred in holding that the present suit is not maintainable. He also submitted that the lower courts have erred in holding that the suit for setting aside part of the decree is not maintainable. He also submitted that the lower courts have erred in holding that the clause in the consent terms which the plaintiff wants to declare void is not severable from the other clauses of the consent decree. He further submitted that the lower courts have erred in not fixing the standard rent of the suit premises.

26.4 The learned counsel for the respondent Mr. S.M. Shah stated that there is concurrent finding of fact as regards fraud pleaded and it is held as a matter of fact that the plaintiff has failed to prove his case of alleged fraud and second appeal is not competent. There is no substantial question of law involved and therefore the second appeal is liable to be dismissed.

26.5 The learned counsel for the respondent has relied

upon Section 17 of the Contract Act which provides the term 'fraud' as under:

"Fraud" means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specifically declares to be fraudulent.

Section 17 analysed: - When analysed Section 17 the following ingredients emerged:

- (i) There should be suggestion as to a fact
- (ii) the fact suggested should not be true
- (iii) the suggestion should have been made by a person who does not believe it to be true; and
- (iv) the suggestion should be made with intent either to deceive or to induce the other party to enter into the contract.

26.6 In my view when the standard rent was fixed at Rs. 250/- per month along with other conditions, both landlord and the plaintiff were aware about the entire facts of the case. The landlord had disclosed entire material on record. There was no incorrect fact stated therein. The four ingredients for constituting fraud were not present in this case. To constitute fraud as indicated above, there should be suggestion as to a fact and the fact suggested should not be true. In this case all facts are true. The landlord has divulged everything on record. There was no intention on the part of the landlord to deceive or induce the tenant to enter into such consent terms. In view of the same, all the four ingredients stated above were not present and therefore the tenant failed and neglected to prove that the landlord had committed fraud for arriving at the consent terms.

26.7 In my view there is a concurrent finding of facts as regards fraud pleaded in the plaint. It is held by the court below that as a matter of fact the plaintiff has failed to prove his case of alleged fraud and as the question of fraud is a mixed question of fact and law and it is not a pure question of law, second appeal is not competent because second appeal is maintainable only on question of law. In my view, fraud is committed wherein one man goes to another to act on a false belief of representation which he does not himself believe to be true. He did not have definite knowledge or belief that it is not true.

26.8 In my view the party plaintiff pleading fraud has to prove by cogent evidence. In suit filed on the basis of the fraud, the allegations of fraud must be clear, definite and specific. In this case though the plaintiff has alleged fraud but before both the courts below the plaintiff failed to prove fraud in this behalf and therefore in the second appeal also the plaintiff is not able to prove fraud and alleged that the decree passed in Regular Civil Suit No. 729/1964 by Joint Civil Judge (J.D.) has been obtained by fraud.

26.9 In view of the above, the Second Appeal is dismissed. Judgement and decree passed by the learned Civil Judge (S.D.), Surat, dated 8.2.1977 passed in Regular Civil Suit No. 89 of 1971 and judgement and decree dated 30.12.1978 passed by the Extra Assistant Judge, Surat in Regular Civil Appeal No. 85 of 1977 is hereby confirmed.

III. FIRST APPEAL NO. 831 OF 1986

27.1 Nadirshah Pirojsha Dalal-appellant (original defendant)-landlord has filed First Appeal 831 of 1986 before this court challenging the judgement and decree dated 31.3.1986 passed by the Third Joint Civil Judge (S.D.), Surat in Special Civil Suit No. 153 of 1974 filed by C.C. Trivedi original plaintiff wherein the learned judge was pleased to partly decree the suit of the plaintiff. The learned judge by his impugned judgement was pleased to direct that the appellant original defendant No. 1 do execute registered sale deed in favour of the plaintiff for whatever share he is having in the suit property after receiving sum of Rs. 55,000/- from the plaintiff within two months. He further directed that defendant No. 1 is directed to put the plaintiff in symbolic possession of his share in the suit property after executing registered sale deed.

FACTS:

27.2 Shri C.C. Trivedi tenant-plaintiff had filed Special Civil Suit No. 153 of 1974 against Nadirsha P. Dalal and others-defendants. In the suit it was contended that Nadirsha defendant landlord intended to sell the suit property. For that purpose he started negotiation with the plaintiff through his uncle Shri Daradsha who is dead. It was stated that the landlord filed Regular Civil Suit No. 729 of 1964 against the tenant for eviction and in the said suit defendant persuaded the plaintiff and the plaintiff agreed to purchase the suit property for a sum of Rs. 55,000/- on 17.10.1968. Consent term was agreed and consent decree was taken place and in view of the consent terms a consent decree has been filed. It was stated that in view of the said consent decree the plaintiff had amended the suit and ultimately prayed that the plaintiff is entitled to suit for specific performance of the contract and prayed that the decree for specific performance is granted against the defendant No. 1 or any defendants who is liable by way of agreement and to direct them to execute sale deed after receiving Rs. 55,000/-.

28.1 Defendant No. 1, Nadirsha filed written statement at Exh. 44 and 104 and resisted the suit. It was contended that the suit is not maintainable in view of Section 34 of the Specific Relief Act. It is also stated that the plaintiff has already filed suit.

28.2 The Third Joint Civil Judge (Senior Division), Surat, by his judgement dated 31.3.1986 was pleased to partly decree the suit and also directed the defendant No. 1 Nadirsha to execute registered sale deed in favour of the plaintiff for whatever share he is having in the suit property after receiving a sum of Rs. 55,000/- from the plaintiff within two months. Defendant No. 1 is also ordered to put the landlord in symbolic possession of his share in the suit property after executing registered sale deed. In case of failure of the defendant No. 1 to execute registered sale deed within two months, the plaintiff is at liberty to apply to the court for execution of the same by deposit sum of Rs. 55,000/- in the court.

28.3 Being aggrieved and dissatisfied with the aforesaid judgement and decree the original defendant Nadirsha has filed this First Appeal before this Court which has been filed on 19.7.1986.

28.4 Learned counsel for the appellant/defendant Mr. S.M. Shah submitted that the the defendant compromised Regular Suit No. 729 of 1964 with the plaintiff alone which means that the defendant was acting in the capacity of landlord which fact was admitted by the plaintiff and that is why he paid him all rent and entered into all the correspondence. The plaintiff in the said suit is estopped from questioning the title of the landlord under Section 116 of the Evidence Act. It was further submitted that rent of Rs. 250/- which standard rent is binding on the plaintiff and that the standard rent of the sued property is Rs. 250/- per month. The defendant has also filed Regular Suit No. 89 of 1971 alleging that the rent indicated in the said suit No. 729 of 1964 was increased by fraud and that the compromise decree in the suit should be held illegal, null and void. The court has dismissed that suit and has upheld that decree in that suit fixing the standard rent of Rs. 250/- was not obtained by fraud. The court however ruled that the defendant is not entitled to agitate the question of standard rent fixed in Regular Suit No. 729 of 1964. Therefore, the rent application 370/71 stands dismissed with costs.

29.1 It was further submitted that the court below has held that from the terms of the compromise (Exh. 33) it is clear that the parties had agreed to sell and purchase the sued property under particular circumstances and in case if the present defendant failed to clear the title of the suit property, then in that case the plaintiff was to be continued as tenant of the sued property on the standard rent of Rs. 250/-. It is, therefore, clear that the defendant had agreed to sell the sued property for Rs. 55,000/- in the circumstances stated in the compromise Exh. 33. He submitted that the plaintiff has filed a suit for specific performance and the finding on issue No. 2 will not be binding to the parties in the suit for specific performance as the plaintiff shall have to prove his case for specific performance independently in that suit.

29.2 It was further stated that on perusal of the compromise Exh. 33, the court below observed that the decree for possession was passed and the plaintiff was to be continued as tenant for Rs. 250/- per month if the defendant did not execute the sale deed after getting the title cleared, but in case the plaintiff did not perform his part of the compromise then he had to vacate the sued property. Thus all the clauses in the compromise are independent of each other and it cannot be said that the plaintiff had agreed to pay the rent of Rs. 250/- on

condition that the sued property was to be sold to him and that he had to increase the rent only for one year. It was further stated that it was the duty of the plaintiff to see as to who were the parties interested in the sued property and whether the defendant alone was the owner of the sued property and whether he could alone execute the sale deed and transfer all the rights of ownership. He further submitted that it may not be correct that the plaintiff admitted the representation of the defendant that he was the sole owner of the sued property because in the compromise it is very specifically mentioned that the defendant to make his title clear and in that Shri Govind Patel's decision was final. If there was no question of clearing the title, then no such conditions would have been written in the compromise but from the fact that names of the interested persons were written in the application letters to the Administrator, the plaintiff realised that there were some other persons who were interested in the sued property and that is why it was written in the compromise that the plaintiff had to clear his title before the due date of sale. It, therefore, cannot be said that the defendant was led away by alleged fraud or misrepresentation made by the plaintiff.

29.3 It was further submitted that the parties had fixed the standard rent of the suit property at Rs. 250/- and then court applied its mind and passed a decree and therefore again standard rent cannot be fixed by the court on application of the tenant. It was further submitted that the parties have fixed the standard rent of the suit property at Rs. 250/per month by the agreement and the court below was of the opinion that no standard rent can be fixed in this suit because the plaintiff has approached the court for setting aside the decree passed in Regular Suit No. 729 of 1964 then that suit will be re-opened and evidence will have to be recorded in that suit and the plea for fixing the standard rent raised in that suit will have to be decided in that suit and no standard rent therefore can be fixed in the present suit.

29.4 It was submitted that the lower court upheld the question of res judicata does not arise in this suit. He therefore ruled that no standard rent can be fixed in the suit. It was further submitted that the terms for the sale of the property are as stated in the compromise Exh. 33

29.5 As per the compromise, terms and condition on interpretation of consent decree of Civil Suit No. 729

of 1964 are: -

- (i) it was a condition for the plaintiff (defendant in First Appeal) to sell the property to the defendant (plaintiff in First Appeal) of Civil Suit No. 729 of 1964 on receipt of the payment of Rs. 55,000/-
- (ii) It was a condition that defendant had either to pay in cash Rs. 55,000/- or deposit the amount in the court to prove his bona fides and willingness to buy the property.
- (iii) It was a condition that if defendant is willing to pay Rs. 55,000/- but the plaintiff does not clear the title of the property, plaintiff will not be entitled to take possession of the property on 17.10.1969.
- (iv) It was binding on both the parties to approach the arbitrator Shri Govindbhai Patel, learned advocate, before 17.10.1969 and obtain his decision in regard to the titles being clear or otherwise. The plaintiff was in possession of the letter of administration and the gift deed executed by some of the heirs to the property and therefore he should have obtained the ruling of the arbitrator in regard to titles, which in fact both the parties have failed to comply.
- (v) There is no condition of specific performance of sale of the share of the plaintiff alone and therefore tenant cannot compel the landlord to sell his part of share as the entire property was to be purchased at Rs. 55,000/- and not part thereof. If it was the intention to buy whole or part of the share, it would have been mentioned so in the compromise.

29.6 In the facts and circumstances of the case, learned counsel for the appellant stated that the appeal arises from suit for specific performance of alleged agreement to sell, the decree Exh. 33, it cannot be decreed. As required by Section 16(c) of the Specific Relief Act the plaintiff has to aver and prove his readiness and willingness to perform the terms of agreement to sell and if he fails therein, the suit for specific performance of contract of agreement to sell cannot be enforced in his favour. In this case, it is clear from the plaint para 19(3) that even on the date of

institution of suit, he wants specific performance of right, title and interest of the defendant No. 1, the appellant on payment of proportionate consideration out of Rs. 55,000/-, the alleged consideration for agreement to sell, by alleging that defendant No. 1 has not got full title in the suit property and defendant Nos. 2 to 4 have right, title and share therein, and as such, it cannot be said that the plaintiff has averred and proved required readiness and willingness and therefore in view of the provisions of Section 16(c) of the Specific Relief Act, the contract of agreement to sell cannot be enforced in favour of the plaintiff and, in the result, the suit for specific performance is liable to be dismissed and the judgement and decree for specific performance, passed by the Trial Court, are liable to be set aside and the appeal is liable to be allowed

29.7 Specific performance relief is always discretionary relief and it cannot be granted in the facts of this case and in view of bar provided by Section 16(c) of the Specific Relief Act and decree of the Trial Court is liable to be set aside and suit for specific performance is liable to be dismissed and the first appeal is liable to be allowed.

29.8 In this case after alleged agreement to sell whereby all property to be sold only for Rs. 55,000/- in 1968 and by now 32 years have passed, this is a fit case to refuse specific performance of alleged agreement and discretionary relief of specific performance cannot be granted and granting that relief is clearly inequitable.

29.9 The learned counsel for the appellant submitted that the time limit provided in the alleged agreement to sell in the fact of the case and in the background of alleged agreement to sell, has to be considered essence of contract and even if it is not so considered, it is clear position that it cannot be totally ignored and delay coupled with rise in the price and rupee has lost its original value, it would be completely inequitable to give relief of specific performance.

29.10 The learned counsel for the appellant has relied on the unreported judgement of this court in First Appeal No. 975 of 1978 decided on 12.1.1983 (Coram: G.T. Nanavati, J). The learned Judge in that case on typed page 18 after Prakash Chandra Vs. Angadlal reported in AIR 1979 SC 1241 observed that such a relief can be denied when equitable considerations point to its refusal. It being an equitable relief, the court may not

grant the same if it finds that the plaintiff himself has not come to the court with clean hands.

29.11 He further submitted that against this judgement an appeal was preferred and in Letters Patent Appeal the Division Bench has dismissed the same.

30. It was further submitted that section 16(c) of the Specific Relief Act is not complied with. Readiness and willingness to act in accordance with agreement has to be alleged in the plaint and has to be performed. The fact that the suit was only for declaration is enough to consider want of readiness and willingness of the tenant and subsequent amendments and declaration and other material pointed out in arguments clearly show want of readiness and willingness on the part of the tenant. It was further submitted that amendment in plaint could not be allowed in view of the fact that it was time barred when application to amend the plaint was made.

31. In the aforesaid circumstances, he has stated that the judgement and decree of the Trial Court be set aside and the first appeal be allowed and the finding that the plaintiff is not able to show that he was ready and willing to purchase the property.

31.1 The learned counsel for the appellants submitted that the time limit provided in the alleged agreement to sell in the fact of the case and in the background of alleged agreement to sell, has to be considered essence of contract and even if it is not so considered, it is clear position that it cannot be totally ignored and delay coupled with rise in the price and rupee has lost its original value, it would be completely inequitable to give relief of specific performance.

31.2 The learned counsel for the appellants submitted that the argument of the plaintiff that he has sought in the plaint instituted, relief of declaration that the defendant is liable to sell his share of the property is misleading the plaint para 19(3) where the declaration sought is only on payment of proportionate consideration agreed and not the full consideration agreed and as such, argument of the plaintiff based upon the prayer made in para 19(3) of the plaint is ill founded and cannot be considered.

32. As regards this submission Mr. S.B. Vakil, learned counsel for the original plaintiff-respondent

stated that consent terms provided for a composite agreement for eviction, agreement to sale and continuation of tenancy. There is no logic behind the proposition that an agreement to sale the property and continuation of tenancy cannot co-exist. The date 17.10.1969 may be of essence with respect to the operation of the consent decree and continuance of tenancy. However, as regards the agreement to sale time would not be of essence of the contract nor was the same made co-extensive with any provision of the compromise relating to the handing over or not handing over of possession by 17.10.1969. Under the law time is not of essence of the contract in an agreement to sale immovable property. In this connection reliance is placed on the following decision:

1 CHAND RANI VS. KAMAL RANI reported in AIR 1993 SC 1742. At para 24 on page 1748 the Hon'ble Supreme Court has observed thus:

"From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are:

- (1) from the express terms of the contract;
- (2) from the nature of the property, and
- (3) from the surrounding circumstances, for example: the object of making the contract".

33 Consent terms do contemplate right in C.C. Trivedi to sue for specific performance of the agreement to sell. Consent terms expressly provided that the other party is entitled to sue the party in default for specific performance. Attempt was made to belittle this provision on the ground that the defaulting party could be either the vendor or purchaser and a vendor cannot have a right to sue for specific performance. This argument ignores that Section 13(1)(d) and Section 17 of the Specific Relief Act in terms speak of the vendor or the lessor suing for specific performance. Moreover, the right to sue for specific performance is a remedy provided by law provided there is an agreement to sell. The agreement need not provide that it may be specifically enforced. Suit for specific performance is a remedy provided by law to enforce a right and its availability does not depend upon any provision in the

agreement between the parties to that effect.

33.1 The Trial Court allowed the amendment of the plaint in R.C.S. No. 89 of 1970 and the suit for specific performance is not time barred. He submitted that the question of limitation arises under Order I Rule 10(5) of the Civil Procedure Code when a party is added in a suit. This has no application to the amendment of the plaint under Order VI Rule 17 of the C.P.C. even when a prayer is added. He has relied on AIR 1967 SC 96. He submitted that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a difference or additional approach to the said facts, the amendment is to be allowed even after expiry of the statutory period of limitation.

33.2 In the facts of the present case Regular Civil Suit No. 89 of 1970 was filed on the same cause of action, namely, the right to purchase the property from the defendant. The relief for declaration sought then and the relief for specific performance sought under the amendment are only two different approaches to the said cause of action. He relied on the decision in the case of HARCHARAN VS. STATE OF HARYANA reported in AIR 1983 SC 43.

33.3 The amendment relating to main controversy not to be refused on technical grounds. The court can grant amendments which may take the suit outside its jurisdiction.

33.4 He further submitted that the suit as amended is not time barred.

33.5 Under the Bombay Civil Courts Act all suits regardless of pecuniary jurisdiction are required to be filed in the Court of Civil Judge (S.D.). The result of amendment taking the valuation of the suit beyond the jurisdiction of the Court of Civil Judge (J.D.) only results in the suit being transferred to the Court of Civil Judge (S.D.) and being renumbered.

33.6 After the amendment application must be read as a whole as if it was written with same ink and pen as the original plaint. The plaintiff C.C. Trivedi was at all times material to the suit ready and willing to perform his part of the contract.

33.7 In view of Section 16(c) of the Specific Relief Act, readiness and willing to be averred and proved is to perform the essential terms of the contract which are to be performed by the purchaser. In the present case, the essential part of the contract to be performed by C.C. Trivedi was to pay Rs. 55,000/-. In paragraph 9 of the plaint, the plaintiff averred that he was ready and willing to purchase the property according to the terms of the agreement. In paragraph 13 of the plaint he also expressed the readiness and willingness to purchase whatever share the plaintiff had in the suit property.

33.8 Readiness and willingness is not required to be pleaded in specific words and pleading of facts constituting readiness and willingness would be sufficient compliance with Section 16(c) of the Specific Relief Act. C.C. Trivedi could at any time waive his right to insist on clear title of Nadirshah and be ready and willing to purchase such title as the vendor has.

33.9 The correspondence between C.C. Trivedi and Nadirshah referred to on page 126 in C.R.A. No. 1328 of 1987 showed the readiness and willingness. A letter dated 28.10.1968 Exh. 222 addressed by C.C. Trivedi to Nadirshah for sending title and C.C. Trivedi addressed a letter dated 11.4.1969 to Shri G.U. Patel which is at Exh. 223 in this behalf. Filing of Regular Civil Suit No. 89 of 1971 challenging fixation of standard rent in no way indicates any lack of readiness and willingness of C.C. Trivedi to perform his part of the essential terms of the agreement to purchase. In this context it is necessary to bear in mind that the agreement as to standard rent related only to the part of the compromise for continuation of tenancy and was not any part of the agreement to sale. Moreover challenge to agreed standard rent is only in determination of legal effect of such agreement.

33.10 The interpleader suit does not indicate any lack of readiness and willingness to purchase the property pursuant to the agreement to sell and particularly on the basis of such title which Nadirshah had. He further stated that the compromise contemplated payment of consideration after Nadirshah has made out a marketable and clear title which Nadirshah has not done. Moreover, C.C. Trivedi gave to Nadirshah notices dated 25.2.1969, 11.4.1969, 15.8.1969 and 18.8.1969 to receive Rs. 55,000/- and execute the sale deed. Even in Regular Civil Suit No. 89 of 1970 C.C. Trivedi had offered readiness and willingness to pay the said amount. Even

after amendment of the plaint C.C. Trivedi offered Rs. 55,000/- for such title which Nadirshah had.

33.11 C.C. Trivedi's purshis in Special Civil Suit No. 153 of 1974 stating that he was willing to deposit the amount of Rs. 55,000/- or to pay the same to Nadirshah, that he was foregoing other claims for damages or compensation unconditionally.

33.12 In 1970 C.C. Trivedi filed Regular Civil Suit No. 89 of 1970 against Nadirshah and others for a declaration that the agreement dated 17.10.1968 for sale of the property was binding on Nadirshah and C.C. Trivedi was entitled to obtain specific performance thereof. In the alternative C.C. Trivedi sought a declaration that other defendants had authorised Nadirshah to sell the property and the agreement was binding on all the defendants. In further alternative C.C. Trivedi sought a declaration that Nadirshah was liable to sell his share of the property.

33.13 In 18.8.1972 C.C. Trivedi applied for amendment of the plaint by addition of defendant Nos. 7, 8 and 9 as parties to the suit as heirs of the deceased defendant No. 8 Frenyben. Therefore, seeking specific performance of the agreement on payment of the consideration amount of Rs. 55,000/-. The Trial court granted amendment. Thereafter the suit was renumbered (Special Civil Suit No. 153 of 1974) and transferred to the court of Civil Judge (S.D.), Surat.

33.14 On 31.3.1986 the trial court ordered Nadirshah to execute registered sale deed in favour of C.C. Trivedi for whatever share he was having in the suit property after receiving the sum of Rs. 55,000/- from the plaintiff within two months and to put C.C. Trivedi in symbolic possession of share in the suit property. The Trial Court dismissed the suit against defendant Nos. 2 to 10.

33.15 On 31.3.1986 the Trial Court ordered on the purshis. C.C. Trivedi filed affidavit on 6.7.1986 in appeal after trial court passed decree for specific performance stating that C.C.Trivedi had deposited the consideration amount in court. The trial court rightly exercised its discretion to grant specific performance under Section 22 of Specific Relief Act. He contended that the stipulated date in the agreement for the vendor clearing his title, the buyer paying consideration to the vendor and the parties executing the sale deed. There is

no dispute that the vendor did not even approach G.U. Patel for obtaining his certificate that the vendor's title to the property was clear. Even independently of any certificate from G.U. Patel, the vendor did not show clear title. The court has found that even on the date of the decree for specific performance the vendor's title to the suit property was not clear.

33.16 He further submitted that section 44 of the Transfer of Property Act provides for sale of the share of a co-owner. Therefore, such sales are recognised by the statute. He further submitted that the court would not refuse to grant specific performance of an agreement to sell by ordering sale of the vendor's share in the property under Section 22 of the Act.

33.17 He has relied on the decision of the Bombay High Court in the case of TARABAI VS. Y. TUKARAM reported in AIR 1956 Bombay 679 and also the decision in the case of KARTAR SINGH VS. HARJINDER SINGH reported in AIR 1990 SC 854. In para 6 the Hon'ble Supreme Court has observed thus:

"As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place."

33.18 He has also relied on the decision in the case of NANCHAND KAKALDAS VS. CHAMPAKLAL reported in 19 G.L.R. 945. On pages 956-957 at para 22 the Division Bench of this court observed as under:

"Mr. Joshi lastly urged that the grant of specific performance of contract is a matter of direction of the court and after the lapse of so many years, the stale claim of the plaintiff should not be entertained. We do not agree. The claim was not stale, but it was kept as fresh as ever by the defendant No. 1 himself by extending

the time on as many as six occasions. Discretion is to be exercised on sound judicial principles. No disadvantage had accrued to the defendant No. 1 because of the lapse of time, nor any untoward benefit has come to accrue to the plaintiff therefrom."

33.19 He stated that all these decisions stated that in exercise of discretion under section 22, the court would not refuse to grant specific performance of agreement to sell by ordering sale of the vendor's share in the property.

34. He submitted that there are positive reasons for the court to exercise its discretion to grant specific performance in favour of C.C. Trivedi. He has relied on the decision of the Hon'ble Supreme Court in the case of PRAKASH CHANDRA VS. ANGADLAL reported in AIR 1979 SC 1241 in which it has been stated that normal rule is to grant specific performance. He further relied on the decision of the Hon'ble Apex Court in the case of D. ANJANEYULU VS. D. VENKATA SESHIAH reported in AIR 1987 SC 1641 in which it is stated that in the case of a tenant who has constructed on land, the court must exercise discretion to grant specific performance of agreement to sell.

34.1 The learned counsel for the respondent further submitted that in the present case it is clear from the rent note that with the consent of the landlord C.C. Trivedi purchased the metal sheet compound wall as well as an outhouse the ownership of which remained with the tenant. It also appears that the tenant was permitted to carry out repairs and amendments to the bungalow and adjoining roofs and outhouse as well as to make construction on the open land for the purpose of a waving factory. Whatever construction were made by the tenant would remain of his ownership and he would be entitled to let out the same. In fact, the landlord has admitted in plaint of this R.C.S. 404 of 1971 that C.C. Trivedi demolished old latrine and constructed a new latrine, made material change in two rooms attached to the bungalow, constructed a factory in open land, carried alterations in the western and southern lobby, removed the old structure purchased from the previous tenant and made pucca structure in its place. If the decree for specific performance was not granted and if and when the tenant was evicted by the landlord he would suffer the loss of the money spent by him for such constructions permitted under the rent note and would lose not only the demised property but his own property standing on the

suit property.

35. Before I consider the rival contention in this behalf, let me consider the statutory provisions, namely, Section 16 of the Specific Relief Act which reads as follows, particularly Section 16(c).

"Section 16 Specific performance of a contract cannot be enforced in favour of a person

(a) who would not be entitled to recover compensation for its breach; or

(b) xxxxxxxxxx

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant"

Explanation - For the purposes of clause (c) -

(i) Where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

35.1 Section 16(c) postulates that the person seeking specific performance of the contract must file a suit wherein he must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him. Such a suit is to be filed within three years of the date fixed for the performance or if no such date is fixed, three years from when plaintiff has noticed that performance is refused.

35.2 I have gone through the papers of the case as well as the judgement of the trial court. In my view looking to the provisions of Section 16(c) of the Specific Relief Act and looking to the facts stated above, the decree passed by the Trial Court is liable to be set aside and First Appeal is to be allowed. In my view when the plaintiff alleges that defendant has not got full title in the suit property as such he has to aver and prove his readiness and willingness to perform the terms of agreement to sell and therefore in view of

Section 16(c) of the Specific Relief Act, the contract of agreement cannot be enforced in favour of the plaintiff and in the result is liable to be dismissed and the judgement and decree for specific performance is liable to be set aside.

35.3 In my view specific performance relief is always discretionary relief and it cannot be granted in the facts of this case and in view of bar provided by Section 16(c) of the Specific Relief Act and decree of the Trial Court is liable to be set aside and suit for specific performance is liable to be dismissed and the first appeal is liable to be allowed.

35.4 In this case the alleged agreement to sell had taken place in 1968 whereas the decision has been rendered by the Trial Court in 1986. 18 years have been passed in the Trial Court in passing the decree. If today when the First Appeal is heard even more years have passed. In the meanwhile there is a tremendous development in the city of Surat and the price of the land has been increased and that granting specific performance would have prejudiced the appellant and discretionary relief of specific performance cannot be granted as granting of specific performance is clearly inequitable.

35.5 In my view the Trial Court has clearly erred in holding the suit in favour of respondent No. 1 to the extent of appellant's share in the property after holding that defendant Nos. 2 to 9 have share in the suit property. In my view the fact that the appellant has not cleared the title. Respondent No. 1 was entitled to remain in suit property. Therefore, there was no question of there being any specific performance. In my view, in 1971 C.C. Trivedi respondent No. 1 filed Civil Suit No. 89 of 1971 contending that consent decree has been obtained by fraud. The suit was dismissed. C.C. Trivedi filed Civil Appeal No. 85 of 1977 before the appellate court which was also dismissed. Subsequently, C.C. Trivedi filed Second Appeal No. 252 of 1979 before this court. In view of the same, in Second Appeal respondent No. 1 is trying to say that the consent decree was obtained by fraud at the same time in the present appeal C.C. Trivedi is trying to enforce specific performance on that same consent decree. In view of the same the very validity of the consent decree on which it was granting specific performance was itself in question. In view of the same action of respondent has given rise to a strange situation wherein in one matter he is trying to say that the consent decree was

obtained by fraud and in another matter he is trying to say that specific performance should be granted on that very same consent decree. In my view normally specific performance is based on a contract. However, there is a difference between a consent decree and contract. In case of a contract, it is an agreement between two people to do or not to do something for a consideration, whereas in case of consent decree there are elements of a contract plus the fact that the court has put its seal of approval on that contract. The court in which consent decree was passed has clearly decided that in case the appellant does not clear the title, it will be open to respondent No. 1 to continue as tenant. This should have been considered as final and no further question of specific performance could have been arisen.

36. In this case as per the consent decree the plaintiff had to obtain clear title of the property and it had to obtain certificate from arbitrator Shri Govindbhai U. Patel, learned advocate, before 17.10.1969. Shri Govindbhai U. Patel had to give a certificate that the title is clear of the property in question. However, the parties have failed to obtain a decision from Shri Govindbhai U. Patel, learned advocate, about clearance of the title before 17.10.1969. In my view the tenant cannot compel the landlord to sell his part of share as the entire property was to be purchased and not part thereof. In view of the facts set out in the appeal and in view of the contentions raised by the learned counsel for the appellant and in view of the provisions of specific relief Act particularly Section 16, in my view, the suit filed by the tenant for specific performance is liable to be dismissed and the judgement and decree for specific performance passed by the trial court are liable to be set aside in this behalf. Looking to the facts and circumstances of the case, the discretionary relief of specific performance cannot be granted. It being equitable relief also it cannot be granted in this behalf. I have considered also the contentions of the learned counsel for the respondents and the decisions cited by him.

37. In view of the same, First Appeal is allowed. The judgement and decree dated 31.3.1986 passed by the third Joint Civil Judge (S.D.), Surat, wherein the trial court directed defendant No. 1 to execute registered sale deed in favour of the plaintiff for whatever share he is having in the suit property after receiving sum of Rs. 55,000/- from the plaintiff within two months is set aside and also further relief which has been granted by the trial court in this behalf.

38.(i) In the result, Civil Revision Application No. 821 of 1979 (tenant's revision) is rejected and thereby confirmed the judgement and decree dated 30.12.1978 passed by the learned Extra Assistant Judge, Surat, in Revision Application No. 6 of 1977.

(ii) Civil Revision Application No. 1091 of 1979 (landlord's revision) is also rejected and thereby confirmed the judgement and decree dated 30.12.1978 passed by the learned Extra Assistant Judge, Surat, dismissing Regular Civil Appeal No. 97 of 1977 filed by the landlord plaintiff against judgement and decree dated 28.2.1977 by the learned Civil Judge (S.D.) dismissing the suit for possession of the palintiff landlord.

(iii) Civil Revision Application No. 1328 of 1987 (tenant's revision) is rejected and thereby confirmed the judgement and decree dated 7.11.1987 passed by the Assistant Judge, Surat by which the learned judgement was pleased to pass a decree for eviction pertaining to suit bungalow on the ground that Nadirshah, landlord, bona fide and reasonably required the bungalow for his residence by rejecting his case for bona fide requirement for business. I direct that the respondent tenant shall handover peaceful possession of the suit bungalow within two months from the date of order of this court.

(iv) Civil Revision Application No. 988 of 1988 (landlord's revision) is rejected and thereby confirming the judgement and decree dated 7.11.1987 passed by the Assistant Judge, Surat.

(v) Second Appeal No. 252 of 1979 is dismissed and thereby confirming the judgement and decree dated 30.12.1978 passed by the Extra Assistant Judge, Surat, in Regular Civil Appeal No. 85 of 1977 by which the learned judge was pleased to confirm the judgement and decree dated 8.2.1977 passed by the Civil Judge (S.D.) wherein the learned trial Judge was pleased to dismiss the suit of the plaintiff.

(vi) First Appeal No. 831 of 1986 is allowed and thereby the judgement and decree dated 31.3.1986 passed by the Third Joint Civil Judge (S.D.), Surat, in Special Civil Suit No. 153 of 1974 filed by C.C. Trivedi (original plaintiff) wherein the learned Judge was pleased to partly decree the suit of the plaintiff by directing the appellant (original defendant No. 1) to execute registered sale deed in favour of the plaintiff

for whatever share he is having in the suit property after receiving a sum of Rs. 55,000/- from the plaintiff within two months is quashed and set aside and also the further relief which has been granted by the trial court in this behalf.

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(vii) After pronouncement of judgement, Shri S.B. Vakil, learned senior advocate for the tenant prays that the judgement and decree in question passed in Civil Revision Application Nos. 821/79, 988/1988, 1091/1979, 1328/1987 be stayed for six weeks as his clients desire to approach the Hon'ble Supreme Court of India. Shri Mehul Shah, learned advocate for the respondents has strongly objected to the same. However, in the interest of justice, the judgement and decree for possession is stayed till 18th May, 2001.

(viii) As regards First Appeal No. 831 of 1986, Shri S.B. Vakil, learned senior advocate for the respondents prays that so far as the decree for eviction is concerned, the landlord may be restrained from alienating or in any way transferring the property in question as his clients desire to approach the Hon'ble Supreme Court. Shri Mehul Shah, learned advocate for the appellants has strongly objected to the same. However, in the interest of justice the landlord is restrained from alienating or in any way transferring the property in question upto 18.5.2001.

Date: 9.4.2001 (K.M. MEHTA, J)

(syed/pkn)